Supreme Court U. S.
FILED
APR 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Appendix Thereto

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Christiansburg Garment Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported but is unofficially reported at 14 FEP Cases 262. The opinion of the District Court appears sub nom, *Equal Employment Opportunity Commission v. Christiansburg Garment Company, Inc.* and is reported at 376 F. Supp. 1067 (W.D. Va. 1974).

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Should the standard applied by District Courts in awarding attorney's fees to a prevailing defendant in a Title VII action under the Civil Rights Act of 1964, as amended, (42 U.S.C. §2000e) be the same as the standard for awarding attorney's fees to a prevailing plaintiff. If not, what should the standard be?

STATUTE INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k) provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

STATEMENT

A. Facts

On February 1, 1968, Rosa C. Helm, a black employee of Christiansburg, was laid off from her job at petitioner's plant in Christiansburg, Virginia. She returned to work about one month later and in May of 1968 filed a charge with the Commission alleging racial discrimination in her one month lay off. The charge was processed and investigated by the Commission. By letter dated Febraury 11, 1970, Christiansburg was advised that there was reasonable cause to believe that it had engaged in employment practices violative of Title VII. Attempts at conciliation were unsuccessful and by letter of July 1, 1970 the Commission notified Mrs. Helm of her right to sue. Mrs. Helm, however, did not exercise her right within the thirty day statutory period. (App. 5A)*

*Appendix included with this petition.

Under the 1972 Amendments to the Civil Rights Act of 1964, which became effective on March 24, 1972, the Commission was authorized to bring suit in its own name to secure compliance with Title VII. On January 25, 1974, the Commission instituted suit on Mrs. Helm's claim in the District Court against Christiansburg. After discovery proceedings were concluded, Christiansburg filed a motion for summary judgment. The District Court, holding that the Commission had no authority to prosecute the action under the 1972 Amendments, granted the summary motion on the basis that Mrs. Helm's claim was not pending with the Commission on the effective date of the 1972 Amendments as required by Section 14 thereof. The court concluded that when Mrs. Helm was notified on July 1, 1970 of her right to bring suit against Christiansburg there was no further action to be taken by the Commission with respect to her charge and accordingly its authority terminated on that date. The Commission did not appeal from this judgment. (App. 5A-6A)

In July, 1975 Christiansburg filed its petition for attorney's fees pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k). The District Court denied Christiansburg's petition. (App. 6A)

B. The Decision of the District Court

The decision of the District Court is summarized in the next to last paragraph of its opinion as follows:

> "Although petitioner prevailed on its motion for summary judgment, the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless. Of the three grounds raised by petitioner in support of its motion for summary judgment, this court ruled in favor of the Commission on two of the grounds. But more importantly, the basis upon which petitioner prevailed was

an issue of first impression requiring judicial resolution. The Commission's statutory interpretation of §14 of the 1972 amendments was not frivolous, and the court has no doubt this suit represented a good faith effort by the Commission to vigorously pursue the duties assigned to it by Congress under Title VII. In such circumstances the court does not believe that an award of attorney's fees against the Commission is justified." (App. 2A-3A)

C. The Decision of the Court of Appeals

A majority of the panel in the Court of Appeals affirmed the District Court. The majority in its opinion concluded: (1) the "policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant", and (2) the Commission did not act in "bad faith in bringing the lawsuit".

The dissent pointed out, first, that the Ninth Circuit in *Van Hoomissen v. Xerox Corporation*, 503 F.2d 1131 (9 Cir. 1974) came "to the opposite conclusion in a case very nearly indistinguishable on its facts from that present here." Secondly, Judge Widener stated:

> "The principle point of my dissent, however, is that the opinion of the majority creates a double standard in the application of Title VII. Employers are forbidden by the Civil Rights Act to apply double standards to their employees, and I do not accept the proposition that the courts should administer one standard for the plaintiff and a very different standard for the defendant in the prosecution and defense of suits under the statute."

REASONS FOR GRANTING THE WRIT

The writ should be granted for two reasons. First, the decision of the Fourth Circuit in this case conflicts with the

decision of the Ninth Circuit in *Van Hoomisen v. Xerox Corporation, supra*, and with the decision of the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Secondly, the plain language of the statute does not suggest or warrant different standards in awarding attorney's fees to prevailing plaintiffs and defendants.

The Supreme Court construed a similarly phrased statute* in *Newman v. Piggie Park Enterprises, supra*, under Title II of the same statute and held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." The Fourth Circuit followed that reasoning in awarding Title VII prevailing plaintiffs attorney's fees in *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4 Cir. 1971) and *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4 Cir. 1971).

But here what's sauce for a goose is not sauce for a gander. The Fourth Circuit majority attributes to Congress in a statute designed to eliminate discrimination an intent to discriminate between plaintiffs and defendants. The rule of the Fourth Circuit majority is that prevailing plaintiffs ordinarily should be awarded attorneys' fees while prevailing defendants ordinarily should *not be* awarded attorneys' fees. Only if the plaintiff has acted in "bad faith" may a prevailing defendant recover.

The Fourth Circuit majority in rejecting equal treatment of prevailing plaintiffs and defendants did so on "policy consideration". As noted in the dissent, "policy considerations are not matters for the court, but are matters for Congress". Unless "policy considerations" are to override the statutory

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*42 U.S.C., §2000a-3(b) provides the court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .".

language, the statute should be construed as non-discriminatory and in accordance with its plain meaning—i.e., that the standard for awarding attorney's fees to a prevailing party should be the same for plaintiffs and defendants.

The language of the statute is not ambiguous, so resort to the legislative history is hardly necessary to determine Congressional intent. Even so, a review of the only relevant legislative history, which deals with the Title II language, confirms that the statute means what it says.

The original House version of the 1964 Civil Rights Act provided that "the person aggrieved . . . shall if he prevails be allowed a reasonable attorneys' fee as part of the costs." Hearings on H.R. 7152, House Committee on Rules, 88th Cong., 2nd Sess. pt. 1, at 17 (1964). The bill, as enacted, authorized fee awards to the "prevailing party", not merely to the "person aggrieved." The obvious purpose was to treat prevailing plaintiffs and defendants alike and make outcome of litigation the determinative factor. This parity of treatment was cited when the Senate rejected an amendment by Senator Ervin which would have deleted any fee provision from Title II. 110 CONG. REC. 14201 (1964). Debate on the amendment centered on Senator Ervin's concern that fee awards would encourage "ambulance chasing" by plaintiffs. The amendment was defeated after Senator Pastore pointed out the discretionary power of courts to award fees to the "prevailing party" defendant: "When a person realizes that he takes the chance of having attorneys' fees assessed against him if he does not prevail, he will deliberate before he brings suit." Id, at 14214. At no point during debate on Title II was there any indication that the standards would depend upon whether the "prevailing party" was a plaintiff or defendant.

The Congressional intent expressed in the plain language of the statute and in its legislative history seems abundantly

clear—prevailing parties, be they plaintiffs or defendants, are to be treated alike in awarding attorney's fees.

If equality of treatment is not to be the standard, petitioner submits that the standard for prevailing defendants should not be the subjective standard of "bad faith".

In *Newman v. Piggie Park Enterprises, Inc., supra,* dealing with attorney fees under Title II, the Supreme Court noted:

> "In remanding the case, the Court of Appeals instructed the District Court to award counsel fees only to the extent that the respondents' defenses had been advanced 'for purposes of delay and not in good faith.' 377 F.2d, at 437. We granted certiorari to decide whether this subjective standard properly effectuates the purposes of the counsel-fee provision of Title II of the Civil Rights Act of 1964. . . . We hold that it does not."

The court went on to note in Footnote 4:

> "4. If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' "

Clearly, the Supreme Court has rejected the "bad faith" standard for awarding attorney's fees. In addition, the Supreme Court noted that the "bad faith" standard for awarding attorney's fees exists independent of any statutory authority. By adopting the "bad faith" standard for awarding attorney's fees to prevailing defendants in Title VII cases, the Fourth Circuit has adopted what the Supreme Court rejected in *Newman, supra.*

Petitioners contend that if a standard other than one of equal treatment is to prevail, it should be an objective standard—was the plaintiff's action in instituting and pursuing the action reasonable—did plaintiff have a reasonable probability of prevailing? If not, the defendant should be awarded attorney's fees. We believe this is the standard implicit in *Van Hoomisen, supra*. It is the standard followed by the District Court in *EEOC v. Western Electric Co.*, —F. Supp.—, 10 FEP Cases 1275 (D.C. Md. 1975).

In *Van Hoomisen, supra,* defendant prevailed on a procedural point. In the case at bar, the defendant prevailed on a procedural point—lack of authority in the Commission to bring the suit. The defendant in *Van Hoomisen* was awarded attorney's fees. The defendant in the case at bar was not. In the case at bar the legislative history left little doubt of the judicial outcome. The EEOC could not or should not have had a reasonable expectation of prevailing in the District Court. The petitioner should have been awarded attorney fees.

CONCLUSION

Therefore, the petitioner respectfully requests that this court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

WILLIAM W. STURGES

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. CHRISTIANSBURG GARMENT COMPANY, INCORPORATED, *Defendant,*	CIVIL ACTION No. 74-18 MEMORANDUM OPINION and ORDER BY: James C. Turk, Chief U. S. District Judge

This case is before the court pursuant to the petition of Christiansburg Garment Company, Inc. (hereinafter "petitioner") for the allowance of attorney's fees against the Equal Employment Opportunity Commission (hereinafter the "Commission").

On January 24, 1974, the Commission filed suit against petitioner pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.* (Supp. 1972) alleging racially discriminatory employment practices. Petitioner thereafter filed a motion for summary judgment on the following grounds: (1) that the suit was time barred under §706(f)(1) of Title VII, 42 U.S.C. §2000e-5(f)(1), which precludes suits being filed more than 180 days after a charge of discrimination was filed with the Commission or the 1972 amendments to Title VII became effective; (2) that alternatively the suit was time barred by the Virginia two-year statute of limitations governing "every action for personal injuries," VA. CODE ANN. §8-24, as amended (Supp. 1973); and (3) that the Commission was without authority to institute the suit because under section 14 of the 1972 amendments to Title VII the Commission's new power to bring suit

was made applicable only "to charges pending with the Commission on the date of enactment of [the 1972 amendments] and all charges thereafter." This court rejected petitioner's arguments that suit was time barred by §706(f)(1) or the Virginia statute of limitations but granted summary judgment on the bases that a charge was not "pending with the Commission" on March 24, 1972 when the Act was amended to give it the power to institute suit. *Equal Employment Opportunity Commission v. Christiansburg Garment Co., Inc.*, 376 F. Supp. 1067 (W.D. Va. 1974).

Petitioner's "Petition for Allowance of Attorney's Fees" is filed pursuant to section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k), which provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

In opposition to the petition, the Commission argues as follows: (1) that the petition should be disallowed because it was not timely filed; (2) that §706(k) should be construed as not authorizing an award of attorney's fees against it; and (3) as a matter of discretion, the court should not award attorney's fees against it in this case. The court need not decide the Commission's first two contentions because in the exercise of its discretion the court is of the opinion that an award of attorney's fees to petitioner is not justified in this case.

Although petitioner prevailed on its motion for summary judgment, the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless. Of the

three grounds raised by petitioner in support of its motion for summary judgment, this court ruled in favor of the Commission on two of the grounds. But more importantly, the basis upon which petitioner prevailed was an issue of first impression requiring judicial resolution. The Commission's statutory interpretation of §14 of the 1972 amendments was not frivolous, and the court has no doubt this suit represented a good faith effort by the Commission to vigorously pursue the duties assigned to it by Congress under Title VII. In such circumstances the court does not believe that an award of attorney's fees against the Commission is justified. *Accord, United States Steel Corp. v. United States,* F.2d (3d Cir. 1974); *Richardson v. Hotel Corporation of America,* 332 F. Supp. 519 (E.D. La. 1971), *aff'd* 468 F.2d 951 (5th Cir. 1972); *Paddison v. Fidelity Bank*, 60 F.R.D. 695 (E.D. Pa. 1973).

Accordingly, on the basis of the reasons and authority stated, the Petition for Allowance of Attorney's Fees is denied.

DATED: This 28th day of July, 1975.

JAMES C. TURK
Chief U. S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2131

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellee,

versus

CHRISTIANSBURG GARMENT COMPANY, INC.,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.
James C. Turk, District Judge.

Argued May 7, 1976 Decided January 12, 1977

Before RUSSELL, Circuit Judge; FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge

William W. Sturges (John J. Doyle, Jr., Weinstein, Sturges, Odom, Bigger and Jonas; William B. Poff on brief) for Appellant; Lang Dover, Attorney for Equal Employment Opportunity Commission (Abner W. Sibal, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Charles L. Reischel, Richard S. Cohen and Ramon V. Gomez, Equal Employment Opportunity Commission on brief) for Appellee.

FIELD, Senior Circuit Judge:

After successfully defending an action brought against it by the Equal Employment Opportunity Commission (Commission) under Title VII of the Civil Rights Act of 1964, as

amended, 42 U.S.C. §§2000e, *et seq.*, (Supp. 1972), Christiansburg Garment Company, Inc., (Christiansburg) petitioned the district court for an allowance of attorney's fees under Section 706 (k) of the Act, 42 U.S.C. §2000e-5 (k). The petition was denied and Christiansburg has appealed.

On February 1, 1968, Rosa C. Helm, a black employee of Christiansburg, was laid off from her job in petitioner's plant in Christiansburg, Virginia. She returned to work about one month later, and in May of 1968 filed a charge with the Commission alleging racial discrimination in her one-month lay off. The charge was processed and investigated by the Commission and by letter dated February 11, 1970, Christiansburg was advised that there was reasonable cause to believe that it had engaged in employment practices violative of Title VII. Attempts at conciliation were unsuccessful, and by letter of July 1, 1970, the Commission notified Mrs. Helm of her right to sue. Mrs. Helm, however, did not exercise her right within the thirty day statutory period.[1]

Under the 1972 Amendments to the Civil Rights Act of 1964 which became effective on March 24, 1972,[2] the Commission was authorized to bring suit in its own name to secure compliance with Title VII, and in December of 1973 the Commission notified Christiansburg that it intended to pursue Mrs. Helm's claim. Attempts to resolve the controversy failed and the Commission instituted suit in the district court against Christiansburg on January 25, 1974. After discovery proceedings were concluded, Christiansburg filed a motion for summary judgment. The district court, holding that the Commission had no authority to prosecute the action under the 1972 Amendments, granted the summary motion on the basis that Mrs. Helm's claim was not pending with the Com-

[1] 42 U.S.C. §2000e-5(e).

[2] Pub. L. 92-261, 86 Stat. 103.

mission on the effective date of the 1972 Amendments as required by Section 14 thereof.[3] The court concluded that when Mrs. Helm was notified on July 1, 1970, of her right to bring suit against Christiansburg there was no further action to be taken by the Commission with respect to her charge and, accordingly, its authority terminated on that date.[4] The Commission did not appeal from this judgment.

In July of 1975, Christiansburg filed its petition for attorney's fees pursuant to Section 706 (k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5 (k), which provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

The district court denied the petition, stating that the Commission's action in bringing the suit could not be characterized as unreasonable or meritless, and that it represented a good faith effort by the Commission to discharge the duties assigned to it by Congress under the Civil Rights Act.

While the Commission took the position in the district court that Section 706 (k) does not authorize an award of attorney's fees against it, it now concedes that the district court

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[3]Section 14 of Pub. L. 92-261 reads as follows:

> "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

[4]The opinion of the district court appears sub nom, Equal Emp. Op. Com'n. v. Christiansburg Garment Co., Inc., 376 F. Supp. 1067 (W. D. Va. 1974).

had such authority under the statute. In making this concession, it recognizes the authority of *United States Steel Corporation v. United States*, 519 F.2d 359 (3 Cir. 1975), and *Van Hoomissen v. Xerox Corporation*, 503 F.2d 1131 (9 Cir. 1974), with which we are in accord. The Commission also concedes that Christiansburg was the prevailing party in this litigation, but contends, however, that the district court acted properly in denying attorney's fees in this case. Christiansburg, on the other hand, takes the position that the court applied an erroneous standard in rejecting its petition.

In private Title VII suits, where the suing party is, in effect, a "private attorney general," attorney's fees are normally awarded to a successful plaintiff upon the basis that such a policy will further the Congressional goal of eliminating discriminatory practices in employment. We so held in *Robinson v. Lorillard Corporation*, 444 F.2d 791 (1971), and *Lea v. Cone Mills Corporation*, 438 F.2d 86 (1971), where we applied the rationale of *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), in Title VII litigation. However, these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant. The distinction between the two was noted by Judge Adams in *United States Steel Corporation v. United States, supra*, 519 F. 2d, at 364:

> "A prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest. In contrast to the advantage to the public that inheres in a successful attack against discriminatory practices, as in *Piggy Park*, one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination. Instead, a

defendant seeking a counsel fee under Section 706(k) must rely on different equitable considerations."[5]

Christiansburg acknowledges that its posture is different from that of a successful party plaintiff, but contends that the reasonableness of the Commission's conduct in pursuing the litigation should be the controlling standard rather than the good faith test which was applied by the district court. It suggests that "good faith" is a highly subjective standard that is inappropriate in the determination of attorney's fees. The good faith standard, however, has been often recognized by the courts, and has acquired a well-defined meaning in this context.[6] It was approved by the court in *United States Steel Corporation v. United States, supra*, 519 F.2d., at 364:

> "The indicia associated with the grant of an attorney's fee-vexatiousness, bad faith, abusive conduct, or an attempt to harass or embarrass—were absent. We do not find the district court's formulation of the standard to be erroneous."

It would appear that this same standard was applied by the Ninth Circuit when it allowed attorney's fees in *Van Hoomissen v. Xerox Corporation, supra*.[7]

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[5]In that case, like the one presently before us, the Commission was a litigating party. The distinction would apply, a fortori, in those actions brought by private parties. *See* Wright v. Stone Container Corp., 524 F. 2d 1058 (8 Cir. 1975).

[6]**See** Alyeska Pipeline Co. v. Wilderness Society, 421 U. S. 240, 245 & 258 (1975).

[7]In denying rehearing in that case the court stated:

> "The court in allowing attorney's fees was mindful that the appeal by EEOC was vexatious and prosecuted on highly questionable grounds." Unpublished Order (9 Cir. No. 74-1037, Nov. 6, 1974).

In the present case the district court noted that it had ruled in favor of the Commission on two of the three grounds raised by the petitioner in its motion for summary judgment, and further observed that the interpretation of Section 14 of the 1972 Amendments was an issue of first impression requiring judicial resolution. We agree with the court below that under these circumstances it could not be said that the Commission acted in bad faith in bringing the lawsuit. Accordingly, the action of the district court is affirmed.

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I

I think it worth mentioning that the Ninth Circuit, in *Van Hoomissen v. Xerox Corp.*, 503 F2d 1131 (9th Cir. 1974),[1] has come to the opposite conclusion in a case very nearly indistinguishable on its facts from that present here.

The rule announced by the majority in this case follows *United States Steel Corp.*, and is that attorneys' fees should not be awarded to a prevailing defendant in a Title VII case unless it may be said that the plaintiff ". . . acted in bad faith in bringing the lawsuit."

In *Van Hoomissen*, the EEOC had attempted to intervene and assert two contentions in the district court; one that Xerox had engaged in retaliation against an employee, and, second, that Xerox discriminated against employees. The district court allowed intervention but restricted its application to the retaliation claim, not permitting litigation of the dis-

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[1]Reported on the merits of dismissing the appeal in 497 F2d 180 (9th Cir. 1974) and in the district court in 368 F. Supp. 829 (1973).

crimination claim. Upon appeal from the denial of intervention as to the discrimination claim, the Court of Appeals dismissed the appeal on the ground that whether or not to allow the EEOC to intervene in the district court was a matter of discretion which had not been abused. There was no intimation of bad faith, harassment, or the like, on the part of the EEOC anywhere in the proceeding, which, concerning itself with technical matters only, was much like that present here. The court held that since Xerox prevailed in the appeal, it qualified as a "prevailing party" under the statute, thus making it eligible for an award of attorneys' fees, and concluded that ". . . we exercise our discretion and award Xerox an attorney's fee of $3,000." p. 1133.

The point I make is illustrated by *Van Hoomissen*. Bad faith on the part of a losing plaintiff in a Title VII case should not be the necessary prerequisite to awarding attorneys' fees.

II

I have mentioned *Van Hoomissen* by way of illustration that there is a conflict in the circuits on this point, and that I think the rule illustrated by that case is preferable.

The principal point of my dissent, however, is that the opinion of the majority creates a double standard in the application of Title VII. Employers are forbidden by the Civil Rights Act to apply double standards to their employees, and I do not accept the proposition that the courts should administer one standard for the plaintiff and a very different standard for the defendant in the prosecution and defense of suits under the statute.

The statute involved here permits the district court ". . . in its discretion . . . [to] allow the prevailing party . . . a reasonable attorney's fee. . . ." 42 USC §2000e-5(k).

It was a statute phrased in like words which the Supreme Court construed in *Newman v. Piggie Park Enterprises*, 390 US 400 (1968), in which the Court held that a prevailing plaintiff under Title II of the same statute "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." p. 402. We followed that reasoning in construing the same statute involved in this case in *Robinson v. Lorillard Corp.*, and *Lea v. Cone Mills Corp.*, as has been noted by the majority.

All of these cases, however, were followed by *Alyeska Pipeline Co. v. Wilderness Society*, 421 US 240 (1975), which put to rest the private attorney general theory of recovery of attorneys' fees unless authorized by statute. *Alyeska* construed 42 USC §2000a-3(b) and *Newman* that ". . . the award should be made to the successful plaintiff absent exceptional circumstances." p. 262. But the opinion continued on the same page "Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for the Congress to determine."[2]

In our case, Congress has determined that an attorney's fee "may" be allowed to "the prevailing party" by the court "in its discretion." And the standard under this Title VII language has been construed under Title II as an award to a prevailing plaintiff absent exceptional circumstances.

The majority supports its denial of the same standard to prevailing defendants as to prevailing plaintiffs in this way: However, these policy considerations which support the award of fees to a prevailing plaintiff are not present in the

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[2]I am aware of S.2278, 94th Congress, 2nd Session, and Senate Report 94-1011.

case of a prevailing defendant."[3] I suggest that policy considerations are not matters for the courts but are matters for Congress. Since Congress has provided that a prevailing defendant may recover an attorney's fee for the successful defense of a suit, no reason exists to apply a radically different standard to a prevailing defendant than to a prevailing plaintiff.

Acknowledging that it is the policy of the United States to eliminate discrimination in employment, as well as in other aspects of our national life, how can it be said that it is not the policy of the United States to allow a defendant to recover an attorney's fee for the successful defense of a claim against it which is without merit? A mere colorable claim, although without merit, is easy to come by. The dozens of records which cross our desks each day are proof certain of that fact. The remedies provided under the statute are radical and undoubtedly would not have been imposed had Congress not believed it necessary to achieve the national goal. But the remedies are no less than government by injunction. This is pointed out in the Legislative History, U. S. Code Congressional and Administrative News, 1964, p. 2415. And while government by injunction is to be abhorred, it is no stranger to our system. Dozens of statutes attest to the contrary. I mention this, not to criticize the statute, but to point out that, like *Dombrowski*, it is strong medicine. Union contracts entered into in good faith, for example, are casually set aside; and awards against defendants running into the hundreds of thousands or even millions of dollars are not uncommon.

Yet the fact that the remedy is so radical, to me, is not inconsistent with an intent of Congress that an unsuccessful

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[3]While the majority properly gives significance to a policy not to discourage suits under Title VII, it fails to consider any countervailing policy short of bad faith.

plaintiff be required to pay attorneys' fees under a standard not substantially different from that of an unsuccessful defendant. Especially where the government is the plaintiff, with its limitless resources and sensitivity to the political winds of the moment, it should not be allowed to escape attorneys' fees by hiding behind a double standard.

The net result we end up with as result of the majority opinion, under a statute which says the court may allow an attorney's fee in its discretion to the prevailing party, is that a prevailing plaintiff is allowed an attorney's fee absent exceptional circumstances, while a prevailing defendant under the same statute is not allowed an attorney's fee unless the plaintiff has prosecuted his action in bad faith. I suggest this is not the level floor the courthouse demands.

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Supreme Court, U. S.
FILED
AUG 4 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition For Certiorari Filed April 9, 1977
Certiorari Granted June 20, 1977

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United States District Court
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

CHRISTIANSBURG GARMENT COMPANY,
Defendant.

Civil Action
No. 74-18

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1/25/74	Complaint, filed
2/ 7/74	Defendant's First Set of Interrogatories, filed
2/ 7/74	Defendant's First Request for Admissions, filed
2/ 7/75	Defendant's Motion to Dismiss, filed
3/ 7/74	Plaintiff's Answer to Defendant's First Request for Admissions, filed
3/ 7/74	Plaintiff's Answer to Defendant's First Set of Interrogatories, filed
4/ 5/74	Defendant's Motion for Summary Judgment, filed
4/ 9/74	Brief in Support of Defendant's Motion to Dismiss and Motion for Summary Judgment, filed
5/ 7/74	Opinion and Order filed by Court
2/20/75	Petition for Allowance of Attorney's Fees by defendant, filed
3/17/75	The Commission's Statement in Opposition to defendant's Petition for the Allowance of Attorney's Fees and Costs and Motion to Dismiss, filed
7/28/75	Memorandum Opinion and Order by Court, filed

United States Court of Appeals

FOR THE FOURTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee,
v.
CHRISTIANSBURG GARMENT COMPANY, INC.,
Appellant.

Civil Action No. 75-2131

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

10/24/15 Record on appeal in one volume, Vol. 1, filed and appeal docketed.

5/ 7/76 Cause argued before Russell, Field, and Widener, in Lexington, and submitted.

1/12/77 Per Curiam opinion filed. Judge Widener dissenting.

1/12/77 Judgment of the district court affirmed. Judgment filed.

4/12/77 Notice evidencing the filing petition for writ of certiorari in the Supreme Court April 9, 1977 filed. (No. 76-1383)

United States District Court

FOR THE

WESTERN DISTRICT OF VIRGINIA

Roanoke Division

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,
v.
CHRISTIANSBURG GARMENT COMPANY, INC.,
Defendant.

Civil Action No. 74-18

PETITION FOR ALLOWANCE OF ATTORNEY'S FEES

Pursuant to Rule 54(a) of the Federal Rules of Civil Procedure and Section 706 of Title VII of the Civil Rights Act of 1964, as amended, defendant Christiansburg Garment Company hereby petitions the Court and alleges and says as follows:

1. That the defendant is an employer under Section 701(b) of Title VII of the Civil Rights Act of 1964.

2. That the Equal Employment Opportunity Commission (EEOC) instituted an action against the defendant in the U. S. District Court for the Western District of Virginia, Roanoke Division on January 24, 1974.

3. That the defendant Christiansburg Garment Company duly filed a Motion to Dismiss the Complaint.

4. That defendant Christiansburg Garment Company filed interrogatories and requests for admission which were answered by plaintiff EEOC.

5. That thereafter on or about April 5, 1974 the defendant Christiansburg Garment Company filed a Motion for Summary Judgment on the pleadings, interrogatories and requests for admission.

6. A hearing on the defendant's motion was held before the Honorable Judge James C. Turk in Roanoke, Virginia on April 9, 1974.

7. On May 7, 1974 the Court issued its decision granting the defendant's Motion for Summary Judgment and dismissing plaintiff's Complaint.

8. More than 60 days have expired since the action was dismissed, and the plaintiff has failed to file or to perfect any appeal in the United States Court of Appeals for the Fourth Circuit.

9. Under Section 706(k) of Title VII of the Civil Rights Act of 1964 as amended in 1972, the prevailing party is entitled to attorney's fees as part of its costs.

10. The defendant Christiansburg Garment Company requests that the Court award the defendant attorney's fees in an amount of not less than Ten Thousand Dollars ($10,000.00) or in such a just amount as the Court may deem just, taking into consideration that the case was one of first impression.

WHEREFORE, the defendant prays that judgment be issued for attorney's fees for the defendant in the amount of $10,000.00.

2. That defendant recover any other costs attributable to this action.

3. For such other relief as the Court may deem just and proper.

This 1 day of February, 1975.

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United States District Court
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,
v.
CHRISTIANSBURG GARMENT COMPANY, INC.,
Defendant.

Civil Action No. 74-18

THE COMMISSION'S STATEMENT IN OPPOSITION TO DEFENDANT'S PETITION FOR THE ALLOWANCE OF ATTORNEY'S FEES AND COSTS AND MOTION TO DISMISS

NOW COMES Plaintiff, Equal Employment Opportunity Commission, hereinafter referred to as the Commission, by Counsel and opposes Defendant's, the Christiansburg Garment Company, Inc., hereinafter referred to as Defendant, Petition for the Allowance of Attorney's Fees and costs on the following grounds:

1. Defendant failed to file the requisite Bill of Costs which is a precondition to recovering costs, pursuant to the applicable statutory provisions.

2. Defendant's inordinate delay in filing its Petition for Allowance of Attorney's Fees and costs for over nine (9) months after judgment was entered, and over seven (7) months after the appeal period expired, operates to deny it the relief it now seeks.

3. Section 706(k) of Title VII does not authorize the award of attorney fees against the Commission.

4. Assuming *arguendo*, attorney's fees are allowable within the discretion of the Court against the Commission, such an award is inappropriate in this case.

For the foregoing reasons, the Commission hereby moves that Defendant's Petition for the Allowance of Attorney's Fees and costs be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAY 26 1977
MICHAEL RODAK, JR., CLERK

No. 76-1383

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHRISTIANSBURG GARMENT COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-A to 13A) is reported at 550 F. 2d 949. The district court ruling denying the award of attorney's fees (Pet. App. 1-A to 3-A) is not officially reported. The order of the district court granting summary judgment is reported at 376 F. Supp. 1067.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1977. The petition for a writ of certiorari was filed on April 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in declining to award attorney's fees to a prevailing defendant in Title VII litigation initiated in good faith by the Equal Employment Opportunity Commission.

STATUTE INVOLVED

Section 706(k) of Title VII, Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. 2000e-5(k), provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

In 1968 Rosa Helm filed a charge with the Equal Employment Opportunity Commission alleging racial discrimination by Christianburg Garment Company with respect to a layoff.[1] After an investigation and a reasonable cause determination, conciliation was initiated. After conciliation failed, the Commission notified Ms. Helm on July 1, 1970, of her right to file suit in federal court. Ms. Helm, however, did not exercise her option to initiate litigation.

Basing its jurisdiction on the Rosa Helm charge, the Commission filed suit in the Western District of Virginia against Christiansburg Garment Company alleging that the company had discriminated, and continued to discriminate, against black employees in violation of Section 703(a) of

[1]The facts of this case are set forth in the opinion of the court of appeals (Pet. App. 5-A to 6-A).

Title VII, 78 Stat. 255, 42 U.S.C. 2000e-2(a). Petitioner moved for summary judgment claiming that the suit was barred by the 180-day provision in Section 706(f)(1), as amended, 42 U.S.C. (Supp. V) 2000e-5(f)(1), that the suit was barred by the two-year state statute of limitations for personal injuries, and that the charge on which the suit was based was not "pending" before the Commission when the 1972 amendments to Title VII authorizing Commission litigation took effect (Pet. App. 1-A to 2-A).[2] The district court rejected the first two arguments but granted defendant's motion for summary judgment on the third issue. The Commission did not appeal.

On February 20, 1975, more than nine months after the district court's order granting summary judgment, Christiansburg filed a petition for an award of attorney's fees pursuant to Section 706(k) of Title VII. On July 28, 1975, the district court denied the company's petition, stating (Pet. App. 2-A to 3-A):

> Although petitioner prevailed on its motion for summary judgment, the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless. Of the three grounds raised by petitioner in support of its motion for summary judgment, this court ruled in favor of the Commission on two of the grounds. But more importantly, the basis upon which petitioner prevailed was an issue of first impression requiring judicial resolution. The Commission's

[2]Section 14 of the 1972 amendments to Title VII (86 Stat. 113) states:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of the enactment of this Act and all charges filed thereafter.

statutory interpretation of §14 of the 1972 amendments was not frivolous, and the court has no doubt this suit represented a good faith effort by the Commission to vigorously pursue the duties assigned to it by Congress under Title VII. In such circumstances the court does not believe that an award of attorney's fees against the Commission is justified.

On appeal, the court of appeals, one judge dissenting, upheld the district court's denial of attorney's fees (Pet. App. 4-A to 13-A). Recognizing that "these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant" (*id.* at 7-A), the court of appeals approved the standard which had been applied by the district court—that an award of attorney's fees against the Commission would be appropriate only when the Commission acted in "bad faith" (*id.* at 9-A).

ARGUMENT

The court of appeals correctly held that attorney's fees are to be awarded against the Commission only upon a finding of bad faith or vexatiousness, a standard that has been uniformly adopted by the courts of appeals that have passed on the issue. *United States Steel Corp.* v. *United States*, 519 F. 2d 359, 364 (C.A. 3); *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131 (C.A. 9).[3] See also *Equal Employment*

[3]In *Van Hoomissen*, relied on by petitioner (Pet. 5) and by the dissenting judge below (Pet. App. 9-A to 10-A), the Ninth Circuit noted that "[t]he court in allowing attorney's fees was mindful that the appeal by EEOC was vexatious and prosecuted on highly questionable grounds" (unreported order on petition for rehearing, quoted by the Third Circuit in *United States Steel Corp., supra*, 519 F. 2d at 364 and n. 23). Moreover, the court of appeals in that decision explicitly recognized that the purpose of the fee provision to encourage private enforcement was an appropriate factor to be considered in the exercise of its

Opportunity Commission v. *MacMillian Bloedel Containers, Inc.*, 503 F. 2d 1086 (C.A. 6). The same principles have been applied with respect to the assessment of fees against unsuccessful private plaintiffs. In *Carrion* v. *Yeshiva University*, 535 F. 2d 722, 727, the Second Circuit recently held:

> * * * [A] prevailing defendant should be permitted such fees, not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.[4]

Congress has also approved this standard. In enacting the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, amending 42 U.S.C. 1988, Congress noted (S. Rep. No. 94-1011, 94th Cong., 2d Sess., pp. 4-5 (1976)):

> It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their

discretion to award fees. Nothing in that opinion conflicts with the holding of the court of appeals below that fees will not be awarded to prevailing defendants in the absence of bad faith (503 F. 2d at 1133).

[4]See to the same effect, *Miller* v. *International Paper Co.*, 408 F. 2d 283 (C.A. 5); *Grubbs* v. *Butz*, 548 F. 2d 973 (C.A. D.C.); *Wright* v. *Stone Container Corp.*, 524 F. 2d 1058 (C.A. 8); *Richardson* v. *Hotel Corp. of America*, 332 F. Supp. 519, 522 (E.D. La), affirmed, 468 F. 2d 951 (C.A. 5).

> opponent's counsel fees should they lose. * * * *Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. United States Steel Corp.* v. *United States*, 385 F. Supp. 346 (W.D. Pa. 1974), aff'd [519 F. 2d 359] (3d Cir. 1975). This bill thus deters frivolous suits by *authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith"* under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. * * * [Footnotes omitted; emphasis supplied.]

Petitioner argues (Pet. 5) that since a prevailing plaintiff in a Title VII action is "awarded attorneys' fees in all but very unusual circumstances,"[5] it is "unfair" not to award attorney's fees as a matter of course to a prevailing defendant. Whatever the merits of that argument as to private litigants, it cannot apply to the Commission. Section 706(k) authorizes fee awards only to a "prevailing party, other than the Commission," and therefore the Commission cannot recover attorney's fees as plaintiff.

In any event, petitioner's argument fails to take into consideration the basic purpose behind the award of attorney's fees. Under the long-established "American rule," recently reaffirmed by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, attorney's fees are not normally recoverable as costs by the prevailing party in a lawsuit. Congress has authorized specific exceptions to the rule and permitted an award of fees in the discretion of the district court in order to further the purposes of particular statutory schemes. In exercising its

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[5] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415. See also *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402.

discretion to award fees, a court is to be guided principally by the underlying purposes of the particular statutory scheme. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416; *Hecht Co.*, v. *Bowles*, 321 U.S. 321. In order to further the national goal of eradicating employment discrimination, a prevailing Title VII plaintiff should ordinarily be awarded attorney's fees because litigation vindicating civil rights furthers the public interest. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 415. See *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402.[6]

By contrast, a successful defense to a civil rights claim generally does not have equivalent implications for the furtherance of the statutory goals of enforcing civil rights. A "prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest." *United States Steel Corp.* v. *United States*, *supra*, 519 F. 2d at 364. Because "these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant" (Pet. App. 7-A), an award of fees to successful defendant in legitimate suit brought in good faith to enforce public rights, is not ordinarily warranted.[7] Since the district court in

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[6] Nothing in *Newman* suggests that the good faith of an unsuccessful plaintiff is not an appropriate consideration in the exercise of discretion to award fees (cf. Pet. 7). This Court merely held that the application of the good faith standard to preclude an award to a prevailing plaintiff would not effectuate the remedial purposes of the counsel fee provision.

[7] The dissenting judge in the court of appeals characterized this rule as a "double standard" (Pet. App. 13-A) involving "policy considerations [that] are not matters for the courts" (Pet. App. 12-A). But the policy of eliminating discrimination in employment has been determined by Congress and designated as a matter of the highest priority. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747. Moreover, as noted above, Congress has explicitly

this case found that the Commission's action represented a good faith effort to enforce Title Vii, the denial of attorney's fees was a proper exercise of the court's discretion that does not merit further review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
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ABNER W. SIBAL,
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JUNE 1977.

---

recognized that the statutory policy will not be served by the award of fees to successful defendants in the absence of the plaintiff's bad faith. See S. Rep. No. 94-1011, *supra*, at 4-5. On the other hand, assessment of fees against a vexatious plaintiff satisfies the "ambulance chasing" concern that was raised by Senator Ervin during the congressional consideration of the fee award statute (110 Cong. Rec. 14213-14214 (1964)). Contrary to petitioner's contention (Pet. 6), nothing in the language of the statute indicates that the Court must exercise its discretion in a mechanistic fashion, awarding fees to all prevailing parties without regard to the congressional policies involved.

DOJ-1977-06

Supreme Court, U. S.
FILED
AUG 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BRIEF OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BRIEF OF THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported but is unofficially reported at 14 FEP Cases 262. The opinion of the District Court appears *sub nom, Equal Employment Opportunity Commission v. Christiansburg Garment Company, Inc.* and is reported at 376 F. Supp. 1067 (W.D.Va.1974).

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1977. Certiorari was granted on June 20 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. §1245(1).

STATUTE INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k) provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

QUESTION PRESENTED

Should the standard applied by district courts in exercising their discretion in awarding attorney's fees to a prevailing defendant in a Title VII action under the Civil Rights Act of 1964, as amended, (42 U.S.C. §2000e) be the same as the standard for a prevailing plaintiff?

STATEMENT OF THE CASE

On January 24, 1974, the Commission filed suit against Christiansburg pursuant to Title VII of the Civil Rights Acts of 1964, as amended, 42 U.S.C. §2000, et seq. (Supp. 1972). Christiansburg thereafter filed a motion for summary judgment on the ground, *inter alia,* that the Commission was without authority to institute the suit because under Section 14 of the 1972 Amendments to Title VII, Pub. L. 92-261, 86 Stat. 103, the Commission's new authority to bring a civil action applied only "to charges pending with the Commission on the date of enactment of (1972 Amendments) and all charges thereafter." The District Court granted Christiansburg summary judgment on the basis that the charge in the case was not "pending with the Commission" on March 24, 1972 when the Act was amended. *Equal Employment Opportunity Commission v. Christiansburg Garment Company,*

Inc., 376 F. Supp. 1067 (W.D.Va.1974) (1-2A Petition for Cert.).

In July, 1975, Christiansburg filed its Petition for Attorney's Fees pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k) (A-3). The District Court denied Christiansburg's Petition stating *inter alia*:

> "Although petitioner prevailed . . . the Commission's action in bringing suit cannot be characterized as unreasonable or meritless . . . and the Court has no doubt this suit represented good faith effort by the Commission—." (1-A Petition for Cert.)

The Court of Appeals for the Fourth Circuit affirmed:

> "Under these circumstances it could not be said that the Commission acted in bad faith in bringing the law suit." (4-A Petition for Cert.)

ARGUMENT

I. The Plain Meaning of the Statute

The statutory provision in issue is set forth above. In quite simple language, it says a district court "in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. . . ." This statute is different from others passed by Congress. For example, it does not restrict an award to the "person . . . injured" as does 15 U.S.C. §15 under the antitrust laws, or to an employee-plaintiff as does 29 U.S.C. §216(b) under the Fair Labor Standards Act. Yet, it is like 35 U.S.C. §285 on patent infringement which provides for awards to the "prevailing party".

The statute in issue does not set forth any standard to be followed by district courts in exercising their discretion in allowing attorney's fees. In that respect, it is like the two statutes cited above allowing attorney's fees under the anti-trust laws and under the Fair Labor Standards Act. It is unlike the above cited statute on patent infringement which provides that the Court "in exceptional cases" may award the prevailing party attorney's fees.

The simple statutory language means:

1. That either the prevailing plaintiff or the prevailing defendant may be awarded an attorney's fee under the statute which courts would otherwise lack authority to award;

2. That the outcome of the litigation determines which party may be entitled to an allowance of attorney's fees; and

3. That district courts should be party-blind in exercising their discretion.

We submit that the statutory language is clear and unequivocal on its face. A prevailing defendant is entitled to an award of attorney's fees on the same basis as a prevailing plaintiff. The language of the statute does not countenance any other construction. In such cases, resort to the legislative history is unnecessary. *Ernst & Ernst v. Hockfelder*, 425 U.S. 185 at 200-1 (1976); *United States v. Oregon* 366 U.S. 643 at 648 (1961).

II. The Legislative History

Although resort to the legislative history of the statute is unnecessary to determine congressional intent, a review of the only relevant legislative history which deals with the Title II language of §202(b), 42 U.S.C. §2000a-3(b), confirms that the statute means what it says.

The pertinent legislative history begins with H.R. 7152, which was the administration's comprehensive bill on civil rights introduced by Representative Celler of New York on June 20, 1963. Section 204(b) of Title II of the bill, provided that "*the person aggrieved* . . . shall if he prevails be allowed a reasonable attorney's fee as part of the cost." (Emphasis added). Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st Sess., Part I at 653 (1963).

In effect, a new bill was substituted by the Judiciary Committee for the original H.R. 7152. See Vass, *Title VII Legislative History*, 7 B.C. Ind. and Com. L. Rev. 431 at 435 (1966). Section 240(a) of Title II of this new bill substituted "*prevailing party*" for "*the person aggrieved*" and read as follows:

> "The Court in its discretion may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the cost." (Emphasis added)

There was no comparable provision under Title VII of the substitute although Title VII provided for civil actions by the Commission and by "the person aggrieved." H. R. Judiciary Committee, Report No. 914, 88th Cong. 1st Sess. (1963). The substitute version of H. R. 7152 was passed by the House of Representatives and sent to the Senate.

On June 4, 1964, H.R. 7152 came before the Senate for consideration. 110 Cong. Rec. 12722. Senator Humphrey in discussing proposed changes to Title VII of the bill, stated:

> "Twentieth. Section 706(1) provides for the award of attorney's fees to the *prevailing party*, other than the Commission and the United States. This should make it easier for a plaintiff of limited means to bring a meritorious suit. The provision for the taxing of costs against the Commis-

sion and the United States is similar to that in section 707(h) of the House bill." 110 Cong. Rec. 12724 (Emphasis added)

In subsequent debate on the bill, Senator Sam Ervin offered an amendment to strike out the Title II provision for awarding attorney's fees to the prevailing party. 110 Cong. Rec. 14201. In commenting on this provision and in replying to Senator Ervin's remark about "ambulance chasing", Senator Miller stated:

> "In response to the point of the Senator from North Carolina about the function or purpose of this provision in the bill, on page 10, possibly serving as a vehicle for ambulance chasing, I would appreciate his comments on this point that the ambulance chasing would be rather futile if the case were not meritorious and if the party lost because as the bill now provides, the attorney's fee is good only to the prevailing party." 110 Cong. Rec. 14213-14

Senator Pastore commented:

> "The purpose of this provision in the modified substitute is to discourage frivolous suits. Here the court would in its discretion be given power to order payment of attorney's fees to the prevailing party. First of all, it is within the discretion of the court. *It is not favoritism toward one party as against the other. When a person realizes that he takes a chance of having attorney's fees assessed against him if he does not prevail, he will deliberate before he brings suit.* He will make certain that he is not on frivolous ground." 110 Cong. Rec. 14214 (Emphasis added)

The Ervin Amendment was defeated in the Senate, 110 Cong. Rec. 14214, and thus the provision for awarding attorney's fees to the prevailing party remained in the bill — both in Title II and Title VII.

The bill as passed by the Senate was subsequently passed by the House of Representatives. The language in Section 202(b) of Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(b) is practically the same as in Section 706(k) of Title VII, 42 U.S.C. §2000e-5(k)*

So spoke Congress.

As the dissent in the Fourth Circuit noted, "policy considerations are not matters for the Court, but are matters for Congress." In *Alyeska Pipeline Services Co. v. The Wilderness Society, et al.*, 421 U.S. 240 (1975), this Court in commenting on various statutes authorizing attorney's fees stated:

> "Under this scheme of things, it is apparent that the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."

Clearly, the Congress in 1964 determined as a matter of policy that prevailing defendants, as well as plaintiffs, should be awarded attorney's fees in the discretion of the Court. Congress could have determined that prevailing plaintiffs only should be awarded attorney's fees, but it did not. Congress could have established different standards for awarding fees to prevailing plaintiffs and defendants, but it did not.

III. Exercising the Discretion

A. *The Standard for Plaintiffs*

How a district court should exercise its discretion was considered in *Newman v. Piggie Park Enterprises*, 390 U.S.

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*The only differences in language are that Section 202(b) refers to "the United States", while §706(b) refers to "the Commission or the United States" and Section 202(b) begins "In any action commenced pursuant to this title", while 706(b) begins "In any action or proceeding under this title."

400 (1968). In that case this Court construed the language in Title II of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000a-3(b), and held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." This rule has been followed in the awarding of attorney's fees to plaintiffs under Title VII. See, for example, *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971).

B. *The Standard for Defendants*

(1) The Bad Faith Standard

The Court below, as well as the district court, held that a different standard should apply in awarding attorney's fees to prevailing defendants. The standard adopted by the courts below in this case is the "bad faith" standard.

In *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974) at 129, this court stated:

> "We have long recognized that attorney's fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ."

In *Newman v. Piggie Park Enterprises, Inc.*, supra, at 402, in respect to awarding attorney's fees under Title II, this court stated in Footnote 4:

> "4. If Congress' objective had been to authorize the assessment of attorney's fees against defendants who made completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons."

In *Alyeska Pipeline Service Co. v. The Wilderness Society*, supra, at 283 this court in referring to footnote 4 in *Newman* said:

> "The Court reasoned that if Congress had intended to authorize fees only on the basis of bad faith, no new legislation would have been required in view of the long history of the bad faith exception."

There can be no doubt that a court's authority to award attorney's fees in "bad faith" cases exists independent of statute. By adopting that standard for prevailing defendants under Section 706(k), the Fourth Circuit in effect construed prevailing defendant out of the statute.

(2) Some Other Standard

If the standard for awarding attorney's fees to prevailing defendants is not the same as for plaintiffs, what is it to be? This kind of legislative invitation was declined by the court in *Alyeska Pipeline Services v. The Wilderness Society, et al., supra*, at 263-4, where the court observed:

> "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorney's fees under some, but not others. But it would be difficult indeed for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorney's fees only in connection with the former. . . . Moreover, should courts, if they were to embark on the course urged by respondents, (1) opt for awards to the prevailing party, whether plaintiff or defendant, or only to the prevailing plaintiff? (2) Should

awards be discretionary or mandatory? (3) Would there be a presumption operating for or against them in the ordinary case?" (Numbers added).

In Section 706(k), Congress answered questions one and two above—awards are to be made to the prevailing party and are to be discretionary. And this Court in *Newman v. Piggie Park Enterprises, Inc., supra.*, answered the third question—there should be a presumption for awarding fees in the ordinary case.

3. A Double Standard?

The plain meaning of the statute should not be tortured to achieve, of all things, a discriminatory result. To impose a different standard for prevailing defendants not only would emasculate the plain language of the statute and the intent of Congress, but as pointed out in the dissent below would create a double standard in the application of Title VII. As the dissent observed:

"Employers are forbidden by the Civil Rights Act to apply double standards to their employees, and I do not accept the proposition that the courts should administer one standard for the plaintiff and a very different standard for the defendant in the prosecution and defense of suits under the statute." (Petition for Cert. 10-A)

* * *

"The net result we end up with as a result of the majority opinion, under a statute which says the court may allow an attorney's fee in its discretion to the prevailing party, is that a prevailing plaintiff is allowed an attorney's fee absent exceptional circumstances, while a prevailing defendant under the same statute is not allowed an attorney's fee unless the plaintiff has prosecuted his

action in bad faith. *I suggest this is not the level floor the courthouse demands.*" (Petition for Cert. 13-A) (Emphasis added)

4. The Same Standard.

The simple language of the statute, the legislative history, this Court's interpretation of Section 202(b) of Title II, the interpretation of Section 706(k) of Title VII by lower courts, and consideration of alternatives, all lead to the inescapable conclusion that the discretionary standard under Section 202(b) and 706(k) is the same and is the same whether the prevailing party be plaintiff or defendant. Only a single standard provides "the level floor the courthouse demands."

CONCLUSION

The Petitioner requests that the case be remanded to the Fourt Circuit with instructions to vacate its judgment and to award attorney's fees to the Petitioner, not only in respect to the original action in the District Court, but also in respect to this action in the District Court, Court of Appeals and Supreme Court.

Respectfully submitted,

WILLIAM W. STURGES

Supreme Court, U. S.
FILED
SEP 30 1977
MICHAEL RODAK, JR., CLERK

No. 76-1383

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHRISTIANSBURG GARMENT COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4–A to 13–A) is reported at 550 F. 2d 949. The district court's order denying the award of attorney's fees (Pet. App. 1–A to 3–A) is not officially reported, but is unofficially reported at 12 FEP Cases 533. The order of the district court granting summary judgment is reported at 376 F. Supp. 1067.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1977. The petition for a writ of

certiorari was filed on April 9, 1977, and was granted on June 20, 1977. The jurisdicton of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion under Title VII in declining to award attorneys' fees to a prevailing defendant in an enforcement action brought in good faith by the Equal Employment Opportunity Commission.

STATUTE INVOLVED

Section 706(k) of Title VII, Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. 2000e–5(k), provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

In 1968 Rosa Helm filed a charge with the Equal Employment Opportunity Commission alleging racial discrimination by Christiansburg Garment Company with respect to a layoff.[1] After an investigation and a reasonable cause determination, the Commission initiated conciliation. Conciliation failed and the Commission notified Ms. Helm on July 1, 1970, of her

[1] The facts of this case are set forth in the opinion of the court of appeals (Pet. App. 5–A to 6–A).

right to file suit in federal court. Ms. Helm, however, did not exercise her option to initiate litigation.

On March 24, 1972, the 1972 amendments to the Civil Rights Act of 1964 became effective, authorizing the Commission to sue in its own name to secure compliance with the Act. Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 113, made the Commission's authority applicable to "charges pending with the Commission on the date of enactment of this Act and all charges thereafter." Basing its jurisdiction on the Rosa Helm charge, the Commission filed suit on January 25, 1975, in the Western District of Virginia against Christiansburg Garment Company alleging that the company had discriminated, and continued to discriminate, against black employees in violation of Section 703(a) of Title VII, 78 Stat. 255, 42 U.S.C. 2000e–2(a). Petitioner moved for summary judgment claiming that the suit was barred by the 180-day provision in Section 706(f)(1), as amended, 42 U.S.C. (Supp. V) 2000e–5(f)(1), that the suit was barred by the two-year state statute of limitations for personal injuries, and that the charge on which the suit was based was not "pending" before the Commission when the 1972 Amendments to Title VII authorizing Commission litigation took effect (Pet. App. 1–A to 2–A). The district court rejected the first two arguments but granted defendant's motion for summary judgment on the third issue. The Commission did not appeal.

On February 1, 1975, more than nine months after the district court's order granting summary judgment,

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Christiansburg filed a petition for an award of attorney's fees pursuant to Section 706(k) of Title VII. On July 28, 1975, the district court denied the company's petition, stating (Pet. App. 2–A to 3–A):

> Although petitioner prevailed on its motion for summary judgment, the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless. Of the three grounds raised by petitioner in support of its motion for summary judgment, this court ruled in favor of the Commission on two of the grounds. But more importantly, the basis upon which petitioner prevailed was an issue of first impression requiring judicial resolution. The Commission's statutory interpretation of § 14 of the 1972 amendments was not frivolous, and the court has no doubt this suit represented a good faith effort by the Commission to vigorously pursue the duties assigned to it by Congress under Title VII. In such circumstances the court does not believe that an award of attorney's fees against the Commission is justified.

On appeal, the court of appeals, with one judge dissenting, upheld the district court's denial of attorney's fees (Pet. App. 4–A to 13–A). Recognizing that the "policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant" (*id.* at 7–A), the court of appeals approved the standard which had been applied by the district court—that an award of attorney's fes against the Commission would be appropriate only when the Commission acted in "bad faith" (*id.* at 9–A).

SUMMARY OF ARGUMENT

1. Normally attorney's fees are not awarded to successful parties to a lawsuit; prevailing defendants like prevailing plaintiffs must ordinarily absorb their attorney's fee costs. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240. Congress has provided limited exceptions to this so-called American rule, utilizing statutes that frequently require the exercise of discretion by the district court in deciding whether to shift the normal fee burdens. Section 706(k), 42 U.S.C. 2000e–5(k), which provides that "the court, in it discretion, may allow the prevailing party * * * a reasonable attorney's fee," is by its terms one such permissive grant of statutory authority to award fees in the discretion of the district court. The congressional choice of permissive and discretionary language indicates that the statute does not require a mechanical award of fees in all cases to all prevailing parties, but mandates instead that the court exercise judgment in determining which prevailing parties in which circumstances should obtain a fee award.

The authority of the district courts under statutes requiring such use of discretion must be exercised with close reference to the goals of the particular legislative scheme. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416; *Hecht Co.* v. *Bowles,* 321 U.S. 321. The "circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 262. In reviewing fee

award standards under fee provisions worded identically to Section 706(k), this Court has therefore looked to the pertinent legislative history and the functions of the fee award in implementing the larger goals of the statutory scheme. See *Newman v. Piggie Park Enterprises,* 390 U.S. 400. The question is not one of abstract fairness, or of the generally equitable distribution of litigation burdens, but more precisely whether the fee standard "properly effectuates the purposes of the counsel-fee provision" (*id,* at 401).

2. In *Newman* v. *Piggie Park Enterprises, supra,* this Court recognized that private litigation is a crucial element in the congressional scheme for enforcement of the civil rights laws. Reviewing standards for a fee award under the pertinent provision of Title II of the Civil Rights Act of 1964, 78 Stat. 244 (42 U.S.C. 2000a–3(b)) which the language of Section 706 (k) exactly tracks, this Court concluded that the primary purpose of the statute in encouraging enforcement by "private attorneys general" required that prevailing plaintiffs "should ordinarily recover an attorney's fee, unless special circumstances would render an award unjust" (390 U.S. at 402). While the legislative history of Section 706(k) is sparse, it indicates that the role of that Section in Title VII of the Civil Rights Act was not intended to be different from the function of the identical fee provisions in Title II to support the efforts of private attorneys general by "mak[ing] it easier for a plaintiff of limited means to bring a meritorious suit" (110 Cong. Rec. 12724 (1964). See *Albemarle Paper Co.* v. *Moody,*

422 U.S. 405, 415; *Johnson* v. *Georgia Highway Express, Inc.,* 488 F. 2d 714, 716 (C.A. 5).

Petitioners and *amici* argue that under *Newman,* fees should ordinarily be awarded to prevailing defendants. But this Court in *Newman* did not purport to establish a standard applicable to both plaintiffs and defendants and the rationale of *Newman* simply does not apply to awards to defendants; the "prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest." *United States Steel Corporation* v. *United States,* 519 F. 2d 359, 364 (C.A. 3). A successful defendant does not act as a "private attorney general," and does not vindicate the Title VII policy prohibiting employment discrimination. As the court of appeals stated, the congressional policy considerations which suport an award of fees to a prevailing plaintiff "are not present in the case of a prevailing defendant" (Pet. App. 7–A).

3. Since Congress plainly intended that fee awards be available to defendants, the rationale for such awards must come from the second purpose of the Section 706(k) authorization, which, as the legislative history explicitly reveals was "to discourage frivolous suits." 110 Cong. Rec. 14214 (1964); see *Grubbs* v. *Butz,* 548 F. 2d 973, 975 (C.A.D.C.). In order to serve this statutory goal of penalizing frivolous litigation without chilling the efforts of private attorneys general, the courts have applied a "good faith" standard under which fees are awarded to a defendant "not routinely, not simply because he succeeds, but only where

the action brought is found to be unreasonable, frivolous, meritless or vexatious." *Carrion* v. *Yeshiva University,* 535 F. 2d 722, 727 (C.A. 2). The same standard has been applied to fee requests by successful Title VII defendants whether the suit was initiated by a federal enforcement agency or by private parties, and the courts exercise their discretion thereunder in light of the entire factual and legal fabric of the litigation including both subjective and objective factors. For example, in the instant case, the court of appeals affirmed the finding of good faith only after assuring itself that the issue litigated by the Commission unsuccessfully was one "of first impression requiring judicial resolution" (Pet App. 9–A), and after the district court had found the Commission's suit to be neither "unreasonable or meritless" (Pet. App. 2–A). This application of the "good faith" standard fully implements the congressional goals "to encourage responsible litigation but to discourage baseless or frivolous actions." *Carrion* v. *Yeshiva University, supra,* 535 F. 2d at 727.

4. The suggestion by petitioner and *amici* that public policy requires that prevailing defendants ordinarily be awarded fees is not only inconsistent with the private attorneys general rationale, it would thwart the primary enforcement incentive purpose of Section 706(k) by "effectively discourag[ing] suits in all but the clearest cases, and inhibit[ing] earnest advocacy on undecided issues." *United States Steel Corporation* v. *United States, supra,* 519 F. 2d at 364–365. As applied to suits initiated by the Equal Employment Opportunity Commission, fee awards

resulting from good faith but unsuccessful litigation would drain Commission resources that Congress recognized were limited in comparison with the Commission's statutory responsibilities. See *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission,* No. 76–99, decided June 20, 1977, slip op., p. 9. Equality of treatment does not require that the Commission ordinarily pay fees to successful defendants because under Section 706(k) the Commission is explicitly precluded from obtaining a fee award when it emerges as a successful plaintiff. Finally, the claim that the language of Section 706(k) requires that fees ordinarily be awarded to successful defendants is inconsistent with Congress's subsequent use of similar language accompanied by explicit congressional adoption of the standards applied by the court of appeals below. S. Rep. No. 94–1011, 94th Cong., 2d Sess., pp. 4–5 (1976); H.R. Rep. No. 94–1558, 94th Cong., 2d Sess., pp. 6–7 (1976).

ARGUMENT

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO AWARD ATTORNEY'S FEES TO A PREVAILING DEFENDANT IN A TITLE VII ENFORCEMENT ACTION BROUGHT IN GOOD FAITH BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

A. SECTION 706(k) REQUIRES A DISTRICT COURT TO EXERCISE ITS DISCRETION IN LIGHT OF THE PURPOSES OF TITLE VII AND THE LEGISLATIVE HISTORY OF THE FEE AWARD STATUTE IN ORDER TO DETERMINE WHETHER A PARTICULAR PREVAILING PARTY SHOULD BE AWARDED ATTORNEY'S FEES.

The long established and recently reaffirmed American rule is that attorney's fees generated by

litigation are not normally recoverable as costs by the prevailing party in a lawsuit. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240. Fees are not ordinarily awarded to a successful plaintiff, and, in the absence of legislation providing for fee awards, prevailing defendants must also absorb what may sometimes be the enormous costs of litigation initiated against them. That the unsuccessful litigation is initiated by a government agency against a private defendant does not alter the rule that each party must bear its own fee costs.[2] While the American rule has been much criticized,[3] Congress has provided only limited exceptions "under selected statutes granting or protecting various federal rights." *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 260.

Congress has drafted its fee award statutes with varying degrees of specificity. Some statutes make fee awards mandatory;[4] others restrict awards to par-

[2] This Court has recognized a number of equitable exceptions to the American rule (see *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 257–259), but the allegedly heavy burden of costs incurred by successful defense of litigation initiated by the government has never been recognized as a sufficient rationale for a fee award.

[3] See *F. D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 128, n. 15; *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 270, n. 45.

[4] See, *e.g.,* the Clayton Act, 38 Stat. 731, 15 U.S.C. 15; the Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U.S.C. 216(b); the Truth in Lending Act, 82 Stat. 157, 15 U.S.C. 1640 (a); and the Merchant Marine Act of 1936, 49 Stat. 2015, 46 U.S.C. 1227.

ticular parties, usually prevailing plaintiffs.[5] Frequently the statutory mandates are less precise, permitting awards to either parties plaintiff or parties defendant and relegating the fee award decision to the discretion of the district court.[6] The authority of district courts under statutes requiring the exercise of discretion is not open ended, but must be exercised with close reference to the goals of the particular statute. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416; *Hecht Co.* v. *Bowles,* 321 U.S. 321. In reviewing fee award standards implementing these discretionary powers, this Court has looked to the pertinent legislative history and the function of the fee award in implementing the larger goals of the statutory scheme. See *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400; *Northcross* v. *Memphis Board of Education,* 412 U.S. 427. Whether the language of the fee award provision is discretionary or mandatory, "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."

[5] See, *e.g.,* the Privacy Act, 5 U.S.C. (Supp. V) 552a(g)(2)(B); Packers and Stockyards Act, 42 Stat. 165, 7 U.S.C. 210(f); Fair Housing Act of 1968, 82 Stat. 88, 42 U.S.C. 3612(c).

[6] See *e.g.,* Trust Indenture Act of 1939, 53 Stat. 1171, as added, 15 U.S.C. 77ooo(e); Securities Exchange Act of 1934, 48 Stat. 889, 15 U.S.C. 78i(e), 78r(a); Federal Water Pollution Prevention and Control Act of 1972, 86 Stat. 888, as added, 33 U.S.C. (Supp. V) 1365(d); Clean Air Act Amendments of 1970, 84 Stat. 1706, as added, 42 U.S.C. 1857h-2(d); Noise Control Act 1972, 86 Stat. 1244, 42 U.S.C. (Supp. V) 4911.

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Alyeska Pipeline Service Co. v. *Wilderness Society, supra,* 421 U.S. at 262.

Section 706(k) is by its terms a permissive grant of statutory authority to award fees in the discretion of the district court. It provides: "[T]he court, in its discretion, may allow the prevailing party * * * a reasonable attorneys fee." 42 U.S.C. 2000e–5(k). This permissive and discretionary language indicates that the statute does not require the mechanical award of fees in all cases to all prevailing parties. But the statutory language provides no further indication of which prevailing parties in which circumstances should obtain a fee award, and there is certainly no language suggesting that "a prevailing [party] defendant is entitled to an award of attorney's fees on the same basis as a prevailing plaintiff" (Pet. Br. 4; see also EEAC Br. 5; Chamber Br. 7)[7]

In the absence of any precise guidance from the statutory language, the courts have developed appropriate standards for the exercise of their discretion under Section 706(k). This Court has addressed under standards governing fee awards to plaintiffs under an identically worded fee provision, and has held that success alone ordinarily merits the award of fees to a Civil Rights Act plaintiff. *Newman* v. *Piggie Park Enterprises, supra,* 390 U.S. at 402. Petitioner claims that the same standards must apply to prevailing defendants. As this Court has indicated, however, the question is not one of abstract fairness, or of generally equitable distribution of litigation burdens, but more precisely whether the fee award standard "properly effectuates the *purposes* of the counsel-fee provision." 390 U.S. at 401 (emphasis added).

[7] "Pet. Br." refers to the Brief of the Petitioner. "EEAC Br." refers to the Brief Amicus Curiae of the Equal Employment Advisory Council. "Chamber Br." refers to the Brief for the National Chamber Litigation Center as Amicus Curiae.

B. THE AWARD OF FEES TO SUCCESSFUL PLAINTIFFS EFFECTUATES THE PRIMARY PURPOSE OF SECTION 706(k) TO PROVIDE SUPPORT FOR PRIVATE ATTORNEYS GENERAL VINDICATING THE TITLE VII PROHIBITION AGAINST EMPLOYMENT DISCRIMINATION

In *Newman* v. *Piggie Park Enterprises, supra,* this Court recognized that private litigation is a crucial element in the congressional scheme for the enforcement of the civil rights laws. "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law" (390 U.S. at 401). The Court characterized private plaintiffs seeking to obtain relief under the 1964 Act as " 'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority" (*id.* at 402).[8] *Newman* arose under Title II of the 1964 Act—specifically, 42 U.S.C. 2000a–3(b)—which the language of Section 706(k) tracks exactly that the "court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee." Contrary to what petitioner suggests should be done here, the

[8] See, also, *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211; *Northcross* v. *Memphis Board of Education, supra,* 412 U.S. at 428.

Court in *Newman* approached the question of standards with particular attention to the fact that the primary purpose of the statute in encouraging private enforcement required that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (390 U.S. at 402).

While the legislative history of Section 706(k) is sparse, it indicates that that Section's role in Title VII of the Civil Rights Act was not intended to be different from the function of the identical fee provisions in Title II to support the enforcement efforts of private attorneys general. Congress has consistently recognized that "most title VII complainants are by the very nature of their complaint disadvantaged." S. Rep. No. 92-415, 92d Cong., 1st Sess., p. 17 (1971). Senator Humphrey, a principal sponsor of the 1964 Act, said with reference to the fee award provision in Title VII: "This should make it easier for a plaintiff of limited means to bring a meritorious suit" (110 Cong. Rec. 12724 (1964)).

The courts of appeals have been uniform in applying the rule that prevailing plaintiffs should ordinarily receive a fee award under Section 706(k) "to make sure that Title VII works." *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 716 (C.A. 5). See *Parker* v. *Califano*, C.A.D.C., No. 76-1416, decided June 30, 1977; *Grubbs* v. *Butz*, 548 F. 2d 973, 975 (C.A.D.C.); *Robinson* v. *Lorillard Corporation*, 444 F. 2d 791, 804 (C.A. 4), certiorari dismissed, 404 U.S. 1006; *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 429-430 (C.A. 8); *Rosenfeld* v.

Southern Pacific Company, 519 F. 2d 527 (C.A. 9); *Carrion* v. *Yeshiva University*, 535 F. 2d 722 (C.A. 2). Any doubt that the district courts should ordinarily make fee awards to plaintiffs to effectuate the private enforcement of Title VII was put to rest by this Court's statement in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (emphasis supplied):

> There is, of course, an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. * * * [T]his interest can be vindicated by applying the *Piggie Park* standard to the *attorneys' fees* provision of Title VII, 42 U.S.C. § 2000e-5(k), see *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

Petitioner and *amici* argue strenuously that *Newman* v. *Piggie Park* requires that fee awards should be made in the ordinary case to successful defendants. But this Court's treatment of the question in *Newman* and *Albemarle* did not purport to establish a standard applicable to both plaintiffs and defendants. Indeed, the rationale of *Newman* simply does not apply to awards to defendants; the "prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest." *United States Steel Corporation* v. *United States*, 519 F. 2d 359, 364 (C.A. 3). A successful defendant does not act as a "private attorney general," and does not vindicate the Title VII policy prohibiting employment discrimination. As the court of appeals stated, "these policy consideration which support an award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant" (Pet. App. 7-A).

Indeed, the prospect of routine conferral of such awards on prevailing defendants would serve to discourage the very enforcement efforts that Section 706(k) was intended to promote (see p. 17, 23–24, *infra*). Accordingly, since a rule ordinarily awarding a fee to a Title VII defendant based simply on the fact of success in litigation would not effectuate, and indeed would disserve, the incentive-to-enforcement purpose of the counsel fee provision, and since Congress plainly intended that fee awards be available to defendants as well as plaintiffs, the rationale for fee awards to defendants must be based on an alternative statutory purpose.

C. THE AWARD OF FEES TO SUCCESSFUL DEFENDANTS WHEN LITIGATION HAS BEEN INITIATED IN BAD FAITH EFFECTUATES SECTION 706(k)'S PURPOSE TO DISCOURAGE FRIVOLOUS TITLE VII LITIGATION.

The fee award authorization in Section 706(k) had a dual purpose. The Court of Appeals for the District of Columbia Circuit reviewed the applicable legislative history in *Grubbs* v. *Butz*, 548 F. 2d 973, 975, and concluded:

> From the Senate debate on the Mansfield-Dirksen amendment * * * two purposes for § 706(k) emerge. First, Congress desired to "make it easier for a plaintiff of limited means to bring a meritorious suit," * * *. * * * But second, and equally important, Congress intended to "deter the bringing of lawsuits without foundation" by providing that the "prevailing party"—be it plaintiff or defendant—could obtain legal fees.

That the purpose of including successful defendants in the fee award authorization was limited to discouraging frivolous litigation is apparent in the legislative history reviewed by petitioner (Br. 6) and *amicus* (Chamber Br. 8–9). Senator Pastore stated explicitly that "[t]he purpose of this provision in the modified substitute is to discourage frivolous suits." 110 Cong. Rec. 14214 (1964). Senator Lausche concurred, stating "that language was inserted in the bill to deter the bringing of lawsuits without foundation." 110 Cong. Rec. 13668 (1964).[9] Finally, Senator Humphrey stated that allowing a reasonable attorney's fee "will obviously operate to diminish the likelihood of unjustified suits being brought." 110 Cong. Rec. 6534 (1964).

To serve the twin goals of the fee award statute by penalizing frivolous litigation without chilling the efforts of private attorneys general, the courts have applied what the court of appeals termed the "good faith" standard (Pet. App. 8–A). The seminal case in this line is *United States Steel Corporation* v. *United States*, 519 F. 2d 359 (C.A. 3), which affirmed the refusal of the district court to award fees to a defendant which had successfully resisted an Equal Employment Opportunity Commission demand for documents. The district court had stated " 'there is nothing to indicate that the demand for access was brought to harass, embarrass or abuse * * * nor can we say [the EEOC's] action was unfounded, meritless, frivo-

[9] Senator Miller made a slightly different point relating to fee awards to plaintiffs; he stated that "ambulance chasing would be rather futile if the case were not meritorious and if the party lost, because as the bill now provides, the attorney's fee is good only to the prevailing party." 110 Cong. Rec. 14214 (1964).

lous or vexatiously brought'" (519 F. 2d at 363). The court of appeals ruled that it was "unable to conclude that the district court abused its discretion in deciding not to award an attorney's fee in this case" (*id.* at 365). In *Carrion* v. *Yeshiva University*, 535 F. 2d 722 (C.A. 2), the court of appeals upheld an award to a successful defendant, stating that such awards should be permitted "not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." (*Id.* at 727). Similarly, an award in favor of a defendant was upheld in *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131 (C.A. 9), where an appeal by the EEOC was judged "vexatious and prosecuted on highly questionable grounds" (unpublished order quoted at Pet. App. 8–A).

With two exceptions,[10] the courts of appeals have

[10] In *United States* v. *Allegheny-Ludlum Industries, Inc.*, 558 F. 2d 742 (C.A. 5), the Court of Appeals for the Fifth Circuit held that in awarding fees, the same standards should be applied to plaintiffs and defendants. This holding is inconsistent with the rule announced by the same circuit in *Bolton* v. *Murray Envelope Corp.*, 553 F. 2d 881, and a petition for rehearing *en banc* has been filed.

In *Equal Employment Opportunity Commission* v. *The Bailey Co., Inc.*, C.A. 6, No. 76–1045, decided September 20, 1977, the Court of Appeals for the Sixth Circuit held that the "plain language" of Section 706(k) precludes the application of a different standard to prevailing defendants from that applied to prevailing plaintiffs (slip op., pp. 28–32)—in other words, that the plain language of that Section precludes the interpretation previously adopted by most courts of appeals. The court's opinion in that case makes no reference to the statement in a prior opinion by a different panel of that court that that Section's "authorization [of a fee

accordingly held that a prevailing defendant in Title VII litigation, whether initiated by the Equal Employment Opportunity Commission or by a private plaintiff, is entitled to an award of attorney's fees only upon a finding that the action was brought in bad faith or vexatiously. See, in addition to the decision below, *United States Steel Corporation* v. *United States, supra; Van Hoomissen* v. *Xerox Corp., supra; Carrion* v. *Yeshiva University, supra; Bolton* v. *Murray Envelope Corp.*, 553 F. 2d 881, 884, n. 2 (C.A. 5); *Grubbs* v. *Butz*, 548 F. 2d 973, 975–976 (C.A.D.C.); *Wright* v. *Stone Container Corp.*, 524 F. 2d 1058, 1063–1064 (C.A. 8); *Richardson* v. *Hotel Corp. of America*, 332 F. Supp. 519, 522 (E.D. La.), affirmed, 468 F. 2d 951 (C.A. 5).

Contrary to *amicus* contention (EEAC Br. 13; Chamber Br. 21-22), in practical application the good faith standard is not completely subjective. For example, in the instant case the court of appeals affirmed the finding of good faith only after assuring itself that the issue litigated by the Commission unsuccessfully was one "of first impression requiring judicial resolution" (Pet. App. 9–A), and after the district

award• to a prevailing defendant] is designed to insure that the EE•C does not commence groundless actions." *Equal Employment Opportunity Commission* v. *MacMillan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1096. Moreover, the court in *Bailey* recognized (slip op., p. 32) that "Congress was aware and approved of the double standard in the award of attorneys' fees under Title VII and intended that result with respect to the 1976 Attorney's Fee Act, although written like § 706(k) of Title VII * * *." See *infra*, pp. 26–30.

court had found the Commission's suit to be neither "unreasonable or meritless" (Pet. App. 2–A)." In making good faith determinations in other cases, the courts have referred to the objective context in which the litigation arose, including any prior litigation of the same issue (*Carrion* v. *Yeshiva University, supra,* 535 F. 2d at 728), the duty of the Commission to advance Title VII policies (*Equal Employment Opportunity Commission* v. *Children's Hospital of Pittsburgh,* 556 F. 2d 222, 224 (C.A. 3)), and the educa-

" The Commission argued that in Section 14 of the Equal Employment Opportunity Act of 1972 (see *supra* p.) Congress had empowered the Commission to institute suit based upon any charge filed with the Commission prior to March 24, 1972, as long as the Commission had found reasonable cause to believe that the respondent was guilty of unlawful employment practices but had been unable to resolve the suit through conciliation. Since it was hoped that at least some companies that had previously refused to conciliate would change their minds with the enactment of the 1972 Amendments, the Commission took the view that charges as to which no private suit had been brought remained pending before the Commission even though conciliation had failed. This view was consistent with legislative history suggesting that the Commission should not ignore employment situations which it had earlier determined to be discriminatory and which apparently remained in effect in March 1972. See Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 1851 (Committee Print, 1972). When the Commission initiated this action, there had been no Supreme Court case interpreting Section 14, and neither petitioner nor *amici* challenge the determinations of both the district court and the court of appeals that the Commission's action satisfied the good faith test. In any event, the "seasoned and wise" rule of this Court is that in the absence of an "exceptional showing of error," the concurrent findings of two lower courts will be considered final. *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214.

tion of the plaintiff (*Kutska* v. *California State College,* C.A. 3, No. 76–1958, decided July 15, 1977, slip op., p. 8." Thus, the application of the good faith standard by the courts takes cognizance of the entire factual and legal fabric of the litigation in order fully to implement the congressional goals "to encourage responsible litigation but to discourage baseless or frivolous actions" *Carrion* v. *Yeshiva University, supra,* 535 F. 2d at 727.

Petitioner (Br. 8) and *amici* (EEAC Br. 6; Chamber Br. 11) claim that limiting fee awards to defendants who were harassed by frivolous litigation is inconsistent with the congressional decision to award fees to "prevailing parties," rather than to "prevailing plaintiffs" as in an earlier draft of the bill, and with the recognition in *Newman* v. *Piggie Park, supra,* that prior to the passage of the 1964 Civil Rights Act, the courts had equitable power to make fee awards against plaintiffs who initiated litigation in bad faith. The legislative history does not reveal the precise reason for the change in the bill's language. See *Grubbs* v. *Butz, supra,* 548 F. 2d at 976, n. 14. But petitioner's argument fails to appreciate that regardless of what equitable powers the courts may have had prior to the passage of the statute, there was a substantial danger

" Similarly, when applying the traditional equitable exception permitting an award of attorney's fees against a bad faith litigant, the courts have considered objective factors indicating the presence or absence of bad faith. See *Hall* v. *Cole,* 412 U.S. 1, 15; *Runyon* v. *McCrary,* 427 U.S. 160, 183–184 (using the term "irresponsible conduct"); *Huecker* v. *Milburn,* 538 F. 2d 1241, 1245, n. 9 (C.A. 6); *Adams* v. *Carlson,* 521 F. 2d 168, 170 (C.A. 7).

that after its passage, the courts would view their fee powers in the cases to which it applied as limited to the statute's specific terms. For example, in *Byram Concretanks, Inc.* v. *Warren Concrete Products Company of New Jersey*, 374 F. 2d 649, 651 (C.A. 3), the court denied a prevailing defendant attorney's fees even after finding that plaintiff's "suit was baseless and not properly grounded under the Anti-Trust statutes" because the Clayton Act, 15 U.S.C. 15, authorized an attorney's fee award only to persons who had successfully asserted antitrust claims. Thus the congressional authorization of awards to prevailing defendants was necessary in order to protect the continuing availability of the award against bad faith litigation.

Contrary to petitioner's contention, nothing in *Newman* v. *Piggie Park Enterprises, supra*, suggests a different conclusion; the Court there explicitly recognized that one goal of the statute was to discourage bad faith litigation. It stated, "Congress therefore enacted the provision for counsel fees" to encourage private enforcement, "not simply to penalize litigants who deliberately advance arguments they know to be untenable." 390 U.S. at 402. Finally, while petitioner argues that it is difficult to believe that Section 706(k) merely enacted into legislation the equitable powers of the courts to penalize bad faith litigation, no concern other than frivolous litigation is expressed in the legislative history it cites.

D. THE ALTERNATIVE STANDARDS PROPOSED BY PETITIONER AND *AMICI* ARE INCONSISTENT WITH THE LEGISLATIVE HISTORY AND PURPOSES OF TITLE VII AND WITH THE SUBSEQUENT EXPLICIT APPROVAL BY CONGRESS OF THE GOOD FAITH STANDARD.

Petitioner and *amici* (Pet. Br. 10; EEAC Br. 8–11; Chamber Br. 13–20) argue that prevailing defendants should routinely be awarded fees on the same basis as are prevailing plaintiffs under the rule approved in *Newman* v. *Piggie Park Enterprises, supra*. As previously noted, nothing in *Newman's* language or logic supports that conclusion. The Court's entire analysis focused on plaintiffs alone, and the private attorneys general rationale on which it relied does not apply to successful defendants. Indeed, awarding fees routinely to successful defendants would thwart the primary purpose of Section 706(k) to serve as an incentive to effective enforcement of Title VII through litigation. "A routine allowance of attorney fees to successful defendants in discrimination suits might effectively discourage suits in all but the clearest cases, and inhibit earnest advocacy on undecided issues." *United States Steel Corporation* v. *United States, supra*, 519 F. 2d at 364–365.[13]

[13] In a brief *amicus curiae*, the National Chamber Litigation Center suggests that constitutional considerations require the application of the same standard in awarding attorney's fees (Br. 20–21). Plaintiffs and defendants, however, are not similarly situated persons. Congress has recognized that private Title VII plaintiffs and defendant employers do not have the same resources (S. Rep. No. 92–415, 92d Cong., 1st Sess., p. 17 (1971)), and this Court has upheld the constitutionality of statutes awarding attorney's fees only to prevailing plaintiffs on the basis of the differing litigation burdens born by plaintiffs and defendants. See *Missouri, Kansas & Texas Railway Company of Texas* v. *Cade*, 233 U.S. 642, 650.

Not only would such a rule deter private plaintiffs from playing the private attorneys general role that *Newman* recognized as central to the scheme of the 1964 Civil Rights Act, but it would also hinder the Equal Employment Opportunity Commission's performance of the enforcement role assigned to it by the 1972 Amendments. Congress knew that the Commission's resources were severely limited in comparison with the magnitude of the national objective of eradicating employment discrimination. *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission,* No. 76–99, decided June 20, 1977, slip op., p. 9. In the absence of any supportive language or legislative history, it would be inconsistent with the remedial goals of Title VII to create an attorney's fee rule that would further burden good faith enforcement by the Commission.[14] Such fee awards against the Commission would be especially anomalous because Section 706(k) authorizes fee awards only to a "prevailing party, other than the Commission," and therefore the Commission cannot recover attorney's fees as plaintiff. Thus, whatever the merits of petitioner's argument (Br. 10–11) that equality of treatment demands that the same standard be applied in awarding attorney's fees to both prevailing defendants and prevailing private plaintiffs, it has no application

[14] The Comptroller General has ruled that agencies—such as the Equal Employment Opportunity Commission—which have been authorized by Congress to bring enforcement actions are required to pay their own litigation expenses. See 46 Comp. Gen. 98, 100

where the Commission is the unsuccessful plaintiff.[15]

Amici (EEAC Br. 15–20; Chamber Br. 14–17) seek to support a liberal standard for fee awards to successful defendants by citing the high cost of litigation.[16] and the alleged advantages of fee awards, including

(1966); 38 Comp. Gen. 343, 344–345 (1958). Also, pursuant to 31 U.S.C. 484, the Comptroller General has ruled that where agencies have successfully brought enforcement actions and have recovered costs, such monies are transferred to the Treasury's general fund, not the account of the agency. 47 Comp. Gen. 70, 72 (1967).

Consistent with these rulings, the Equal Employment Opportunity Commission has paid awards for attorney's fees to prevailing defendants from unexpended funds allocated to its legal program, and has returned costs recovered in successful enforcement actions to the Treasury's general fund.

[15] The EEAC argues that routine allowance of attorney's fees to prevailing defendants would not discourage the Equal Employment Opportunity Commission from bringing suit because the Commission has a statutory duty to bring enforcement actions (Br. 9). The Commission's authority to bring suit upon completion of its duty to conciliate is, however, discretionary (*Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission, supra*, slip op., p. 9, n. 18) and as a practical matter its exercise is a function of the resources made available to the Commission.

[16] *Amicus curiae* Equal Employment Advisory Council argues that many Title VII defendants are small businesses and that considerations of fairness require that such employers be awarded attorneys' fees on a routine basis (Br. 18). Congress, however, specifically rejected such protection for small businesses by eliminating a Senate amendment which would have mandated the award of attorney's fees to small employers. S. Rep. No. 92–681, 92d Cong., 2d Sess., p. 19 (1972). Congress instead provided protection to small businesses by exempting businesses with less than 15 employees from the coverage of Title VII (see Section 701(b) of Title VII, 42 U.S.C. 2000e(b), even though it was aware that "small establishments have frequently been the most flagrant violators of equal employment opportunity" and even though, for this reason, it had originally been proposed that the exemption be limited to businesses with less than eight employees. S. Rep. No. 92–415, 92d Cong., 1st Sess., p. 8 (1971).

checking "our ever expanding bureaucracy" and protecting the benefits of a company's employees. Nothing in the legislative history suggests that any of these claimed advantages of fee shifting were considered by Congress or were intended to be implemented by Section 706(k). Nor is there any indication that Congress intended that fee shifting would be justified simply because under the American rule the defendant in litigation, whether successful or unsuccessful, must ordinarily bear what may often amount to large litigation costs. Fee shifting was discussed by Congress only in the context of either an incentive to private plaintiffs or a discouragement to frivolous suits. To permit awards for other purposes would therefore be improper, since "the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 262.

Moreover, the claim that the language of Section 706(k) requires a single standard of fee awards is inconsistent with Congress's subsequent use of similar language accompanied by explicit congressional adoption of the standards applied by the court of appeals below. The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, amending 42 U.S.C. 1988, like Section 706(k), states that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs." [17]

[17] The Civil Rights Attorney's Fees Awards Act authorizes the courts to exercise discretion in awarding attorney's fees to prevailing parties in actions *inter alia*, under 42 U.S.C. 1981 which, like Title VII, prohibits discrimination in private employment on the basis of race. *Johnson* v. *Railway Express Agency*, 421 U.S. 454.

The Senate Judiciary Committee's report declared (S. Rep. No. 94–1011, 94th Cong., 2d Sess., pp. 4–5) (1976) (emphasis supplied):

> *It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.* A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. * * * *Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. United States Steel Corp.* v. *United States,* 385 F. Supp. 346 (W.D. Pa. 1974), aff'd [519 F. 2d 359] (3rd Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. * * * [Footnotes omitted; emphasis supplied.]

The House Judiciary Committee's report stated (H.R. Rep. No. 94–1558, 94th Cong., 2d Sess., pp. 6–7 (1976)):

> [T]he courts have developed a different standard for awarding fees to prevailing defendants

because they do "not appear before the court cloaked in a mantle of public interest." *United States Steel Corp.* v. *United States,* 519 F. 2d 359, 364 (3rd Cir. 1975). As noted earlier such litigants may, in proper circumstances, recover their counsel fees under H.R. 15460. To avoid the potential "chilling effect" * * * and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely "to harass or embarrass" the defendant. *United States Steel Corp.* v. *United States, supra* at 364. If the plaintiff is "motivated by malice and vindictiveness," then the court may award counsel fees to the prevailing defendant. *Carrion* v. *Yeshiva University,* 535 F. 2d 722 (2d Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, *Wright* v. *Stone Container Corp.* 524 F. 2d 1058 (8th Cir. 1975); see also, *Richardson* v. *Hotel Corp. of America,* 332 F. Supp. 519 (E.D. La. 1971), *aff'd without published opinion,* 468 F. 2d 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes.[18]

[18] Congress intended that the bad faith standard governing the discretionary award of attorney's fees to prevailing defendants should be applicable to government enforcement litigation. The Civil Rights Attorney's Fees Awards Act of 1976 contains a provision which authorizes a court to award attorney's fees to a prevail-

Congress considered providing attorney's fees only to a prevailing plaintiff, but, relying on judicial decisions holding that a prevailing defendant is entitled to a discretionary award of fees only upon a finding of bad faith, it adopted language similar to that of Section 706(k) of Title VII. See H.R. Rep. No. 94–1558, 94th Cong., 2d Sess., p. 6 (1976).[19] While this legislative

ing defendant in an action by the United States to recover unpaid taxes. In awarding such fees to a prevailing taxpayer, Senator Kennedy stated that "awards are appropriate where * * * the plaintiff, the Government, acted in a frivolous or vexatious manner or brought the suit for purposes of harassment." 122 Cong. Rec. S17050 (daily ed., September 29, 1976).

[19] If the issue were the initial interpretation of Section 706(k), a strong argument could be made that Congress did not, in 1964, intend to permit the award of attorney's fees against the government any more than it permitted such awards in favor of the government.

Section 707(h) of H.R. 7152, as passed by the House of Representatives, provided only that "the Commission shall be liable for costs the same as a private person." H.R. Rep. No. 914, 88th Cong., 1st Sess., p. 13 (1963). Such a provision was required because, at the time Title VII was enacted, the United States was not ordinarily liable for costs when it brought suit. See the statement of Senator Humphrey explaining a similar provision in the House version of Titles III and IV, Civil Rights Act of 1964, 78 Stat. 246, (110 Cong. Rec. 6543 (1964)). Compare 62 Stat. 973 with 80 Stat. 308, amending 28 U.S.C. 2412 in 1966 to authorize the recovery of costs from the United States. The term "costs," however, does not include attorney's fees. See 28 U.S.C. 2412.

A provision authorizing the award of attorney's fees first appeared in the Dirksen-Mansfield amendment introduced on the Senate floor. 110 Cong. Rec. 11933 (1964). As explained by Senator Humphrey: "This should make it easier for a plaintiff of limited means to bring meritorious suits. The provision for the taxing of costs against the Commission and the United States is similar to that in section 707(h) of the House bill." 110 Cong. Rec. 12724 (1964). Senator Humphrey's analysis indicates that Congress may

history of a subsequently enacted statute indicating Congress' careful review and adoption of the prevailing interpretation of Section 706(k) may not merit the weight given to contemporaneous statements, it is nevertheless "entitled to careful consideration 'as a secondarily authoritative expression of expert opinion,'" *Parker* v. *Califano, supra,* slip op., pp. 41–42; see *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 379–381. The interpretative value of that history is increased here since the language of the subsequent enactment "tracks the language of the counsel fee provisions of Titles II and VII of the Civil Rights Act of 1964" (H.R. Rep. No. 94–1558, *supra,* at p. 5), and because Congress indicated so clearly that it intended that the "standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. No. 94–1011, *supra,* at p. 4. Since the legislative history and statutory purposes of Section 706(k) (see p. 12, *supra*) support, rather than contradict, the interpretation of that section that has been adopted by the majority of the courts of appeals and by Congress, that interpretation should be sustained.

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have intended that only "costs," not attorney's fees, be awarded prevailing defendants in government litigation.

Since Congress, however, has adopted the interpretation of the courts of appeals that attorney's fees may be assessed against the government in situations of bad faith, we are not urging a different position here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1977.

U. S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
FILED
AUG 18 1977
MICHAEL RODAK, JR., CLERK

No. 76-1383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* of the Equal Employment Advisory Council (EEAC) is submitted pursuant to the written consent of all parties.[1] EEAC is a voluntary, non-profit association, organized as a corpora-

[1] Their consent has been filed with the Court Clerk.

tion under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) (The Act or Title VII). As such, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, which involve the proper standard to be applied to determine when prevailing defendants should be awarded attorney's fees against the Equal Employment Opportunity Commission (EEOC).

FACTS AND DECISION BELOW

The facts of this case are discussed in detail in the brief of the petitioner, the Christiansburg Garment Company (herein Christiansburg). Those facts which have particular relevance to this brief *amicus curiae* are set forth briefly below.

In July 1975, after successfully defending itself against a suit brought by the EEOC,[2] Christiansburg

[2] The EEOC had filed the suit in January 1975, some 4½ years after the charging party elected not to sue in her own behalf. The district court granted summary judgment in Christiansburg's favor, because the charge on which the suit was based was not pending before the Commission when the 1972 amendments took effect authorizing the EEOC to commence suits in its own name with respect to "pending" charges. See Section 14 of Pub. L. 92-261, 86 Stat. 103 (March 2, 1972).

sued the EEOC for attorney's fees pursuant to Section 706(k) of Title VII. The district court denied the employer's petition, stating that the EEOC had brought the initial suit in good faith and that its action could not be characterized as unreasonable or meritless (Pet. App. 2-A and 3-A).

Before the Fourth Circuit, the EEOC conceded that the district court had the authority under the statute to award attorney's fees against it, but argued that the district court properly denied the company's request. The Fourth Circuit agreed, adopting the standard approved by the Third Circuit in *United States Steel Corporation* v. *United States*, 519 F.2d 359, 364, 10 FEP Cases 1106, 1109 (3rd Cir. 1975), for the award of attorney's fees against the EEOC, that is:

> The indicia associated with the grant of an attorney's fee—vexatiousness, bad faith, abusive conduct, or an attempt to harass or embarrass . . . (Pet. App. 8-A).

In dissent, Judge Widener stated that this formula created a double standard in the application of Title VII (Pet. App. 10-A to 13-A). Thus, while prevailing defendants must meet the strict *U.S. Steel* standard, successful plaintiffs ordinarily recover such fees unless special circumstances would render the award unjust. The dissent argued that permitting equality of recovery of attorney's fees by Title VII defendants

and plaintiffs was not inconsistent with Congress' policy to eliminate discrimination in employment. Noting that a merely colorable, though meritless, suit is easily brought, Judge Widener pointed out that "where the government is the plaintiff, with its limitless resources and sensitivity to the political winds of the moment, it should not be allowed to escape attorney's fees by hiding behind a double standard." (Pet. App. 13-A). He further suggested that "this is not the level floor the courthouse demands." (*Id.*).

In its petition before the Court, the employer argues that prevailing plaintiffs and defendants in Title VII cases should be awarded attorney's fees under the same standard. For the reasons set forth below, the *Amicus*, EEAC, supports the employer's arguments as being consistent with Congressional intent and with the purposes of Title VII.

I. PROPER INTERPRETATION OF SECTION 706(k) REQUIRES APPLICATION OF THE SAME STANDARD FOR AWARDS OF ATTORNEY'S FEES TO ALL "PREVAILING" PARTIES

The dispute in this case centers around the proper interpretation of Section 706(k) of Title VII,[3] which provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

[3] 42 U.S.C. § 2000e-5(k).

The court below recognized that even though an award of attorney's fees in Title VII cases ostensibly is a discretionary matter, in practice such discretion is narrowly exercised when the section is applied to private Title VII plaintiffs. Absent special circumstances, attorney's fees are awarded to prevailing plaintiffs as a matter of course. Pet. App. 7-A, and cases there cited. See also *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968); and *Clanton* v. *Allied Chemical Corp.*, 409 F.Supp. 282, 12 FEP Cases 1115 (E.D. Va. 1976), and cases there cited. The court concluded, however, that this rule should not apply to prevailing defendants where the EEOC was the unsuccessful plaintiff. A proper reading of the statute, however, indicates that this conclusion was erroneous.

First, the language of Section 706(k) indicates that awards to prevailing plaintiffs and defendants should be made upon the same standard. Where there is a statutory purpose to provide disparate treatment, Congress on other occasions has made that intent clear. For example, the Fair Housing Act (42 U.S.C. § 3612(c)) provides that the court may grant "reasonable attorney fees in the case of a prevailing *plaintiff*: *Provided*, That said *plaintiff* in the opinion of the court is not financially able to assume said attorney's fees" (emphasis added). Section 3612(c) does not make a similar fees award to prevailing defendants. The lack of such a double standard in the language of Title VII provides initial evidence that a like standard was intended for prevailing parties on either side.

Second, this Court has recognized that even where there is no specific statutory authority permitting an attorney's fees award, the federal courts, in the exer-

cise of their inherent equitable powers, may award attorney's fees when the interests of justice so require. See *Hall* v. *Cole*, 412 U.S. 1, 4-5, 83 LRRM 2177, 2178 (1973). Thus, "it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." (*Id.*) See also *Newman* v. *Piggie Park Enterprises*, *supra*, 390 U.S. at 403; and *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). Thus, the court below and in *United States Steel* (see *supra*, p. 3) have interpreted Section 706(k) as permitting the payment of attorney's fees to defendants only in those circumstances under which they could have been awarded even if Section 706(k) had not been enacted. But as this Court stated in *Newman* v. *Piggie Park* in rejecting an analogous argument, had that been Congress' objective, "no new statutory provision would have been necessary . . ." (390 U.S. at 402 n.4).

Third, as set forth more fully in the employer's brief and petition for certiorari, there is nothing in the legislative history of Section 706(k) to indicate that Congress intended to award attorney's fees differently to plaintiff's and defendants, especially where the EEOC was the unsuccessful plaintiff.

II. IMPORTANT POLICY CONSIDERATIONS SUPPORT REJECTION OF THE STRICT STANDARD IMPOSED BY THE COURT BELOW FOR AN AWARD OF ATTORNEY'S FEES AGAINST THE EEOC

As shown, the specific statutory language and legislative history indicate that Section 706(k) requires the EEOC to pay attorney's fees to prevailing de-

fendants whenever the agency's suit is unsuccessful. Neither the statute nor this history support the Fourth Circuit's holding that the agency must pay attorney's fees only when there was an absence of "good faith" on the EEOC's part. Lacking such direct statutory authority, the court below relied upon policy considerations which were formulated for another context—the award of attorney's fees to successful Title VII *private* plaintiffs. First, the court noted that private persons often act as "private attorneys general" in furthering Congress' goal of eliminating discriminatory employment practices. (Pet. App. 7-A). Apparently, the court concluded that an award of attorney's fees, even where the EEOC acted "unreasonably," would unduly inhibit the EEOC's enforcement of the Act. Second, the court cited language in the *United States Steel* decision of the Third Circuit (*supra*, 519 F.2d at 364; 10 FEP Cases 1108-1109) (Pet. App. 7-A to 8-A)) which stated:

> A prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest. In contrast to the advantage to the public that inheres in a successful attack against discriminatory practices, as in Piggy [sic] Park, one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination. Instead, a defendant seeking a counsel fee under Section 706(k) must rely on different equitable considerations. A factor frequently considered in awarding an attorney's fee is the proper conduct of a plaintiff. The standard of improper conduct, it would seem, would apply against the EEOC much as it would against a private party. Where a court finds that a pro-

> ceeding was maintained in bad faith, imposition of a counsel fee against a government plaintiff may be appropriate.

These arguments, however, misapply the private attorney general concept to the EEOC and completely disregard the role of Title VII defendants in the legislative scheme.

A. Awarding Attorney's Fees to a Prevailing Defendant, Absent Special Circumstances, Will Encourage the EEOC's Proper Administration of the Statute

Although the *Amicus* recognizes both that private persons often play an important role in enforcing Congressional policy, and that the EEOC has a mandate to eliminate employment discrimination, the principles underlying each concept are not necessarily applicable to the other. "Private attorney general" litigation (often characterized as "public interest litigation") has an important element *not* present in the instant case, which is

> that it is brought by a private plaintiff rather than by a governmental agency. It does not matter whether the plaintiff is an individual, a group of persons or an organization; the crucial element is that the plaintiff *does not have an obligation under the law* to initiate the type of lawsuit that has been brought. Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. Rev. 301, 305 (1973) (emphasis added).

Because no legal obligation to undertake such suits exists for private plaintiffs, the courts have indicated that an incentive to bring such suits might be diminished if attorney's fees often were denied under too strict a standard.[4]

Such attorney's fees considerations as pertain to private plaintiffs, however, are not transferrable to a case where the government is the unsuccessful plaintiff. As the court stated in *United States* v. *Gray*, 319 F.Supp. 871, 872 (D.R.I. 1970):

> In the instant case, in which the United States is the party plaintiff, the policy expressed in [*Piggie Park*], of encouraging private enforcement of the Civil Rights Act, is inapplicable, *since the Attorney General presumably needs no incentive* to bring an action to enjoin racial discrimination (emphasis added).

Thus, Section 706(a) of Title VII requires the EEOC to investigate, conciliate, and if necessary prosecute those charges filed with it alleging employment discrimination. No further incentive is required.

Moreover, as the EEOC is the primary enforcer of Title VII, "[t]he court may properly expect the EEOC to have expertise in fair employment law and thus to be more competent than a private plaintiff in determining which cases are unreasonable." Vining, *Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants*,

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[4] *See e.g., Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (5th Cir. 1971). *But cf., Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Although the Court in *Alyeska* denied the plaintiff's request for attorney's fees, it did so because, unlike the instant case, there was no specific statutory authorization permitting the award. 421 U.S. at 263-68. The government's reliance on *Alyeska*, therefore, is unpersuasive. (*See* EEOC Op. Cert. at p. 7).

1976 Wis. L. Rev. 207, 228.[6] If such authority is *properly* exercised, therefore, the function of Section 706(k), "to insure that the EEOC does not commence groundless actions," [6] need not be invoked often.

It is extremely unlikely that an award of attorney's fees under the standard proposed by Christiansburg would have an *unwarranted* inhibiting effect upon the EEOC's enthusiasm in enforcing the statute. Indeed, the past history of EEOC's enforcement of the Act would lead to the directly opposite conclusion. While we know of no cases documenting any lack of interest on the part of the EEOC in carrying out its statutory duties, there are a considerable number of instances in which the courts have awarded attorney's fees against the agency, and, in so doing, have expressed concern that less zeal and more circumspection by the EEOC would have been appropriate.[7] Were the EEOC

[5] As to the EEOC's expertise, *see generally, Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431, 10 FEP Cases 1181, 1192 (1975), *citing Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34, 3 FEP Cases 175, 179 (1971).

[6] *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1096, 8 FEP Cases 897, 904 (6th Cir. 1974). *Accord, United States* v. *Gray, supra*, 319 F. Supp. at 872.

[7] *See e.g., EEOC* v. *Anchor Continental, Inc.*, —— F.Supp. ——, 15 FEP Cases 90, 92-96 (D.S.C. 1977); *EEOC* v. *Western Electric Co.*, 10 FEP Cases 1275, 1276 (D. Md. 1975); *EEOC* v. *New Enterprise Stone & Lime Co.*, —— F. Supp. ——, 15 FEP Cases 25, 28, 29-30 (W.D. Pa. 1977); *EEOC* v. *Service Container Corp.*, 418 F.Supp. 898, 901 (W.D. Okla. 1976); *EEOC* v. *South Carolina Bank*, 12 FEP Cases 1565 (D.S.C. 1976); *EEOC* v. *Moore Group, Inc.*, —— F. Supp. ——, 12 FEP Cases 868, 871 (N.D. Ga. 1976); *EEOC* v. *Carter Carburetor*, —— F.Supp. ——, 14 FEP Cases 665 (E.D. Mo. 1977).

to follow the principles set forth in those decisions, it is likely that awards of attorney's fees against it would be infrequent, even if generally granted where the agency does not prevail.[8]

Moreover, past experience again demonstrates that any administrative costs of attorney's fees would not unduly restrict the interest of the agency in prosecuting alleged violators. Indeed, the EEOC's backlog and other administrative difficulties [9] have not prevented it from enthusiastically attempting to continue suits which had been delayed apparently because of administrative burdens.[10]

[8] It also has been pointed out that "[b]ecause the EEOC is likely to be more able to absorb awards than a private plaintiff and because the agency's basic function is to eradicate discrimination, the award of fees is less likely to have serious impact on discouraging meritorious EEOC suits." See Vining, *supra*, 1976 Wis. L. Rev. at 228.

[9] *See generally, Occidental Life Insurance Co.* v. *EEOC*, 45 U.S.L.W. 4752, 4756 & nn.24-25, 14 FEP Cases 1718, 1724-1725 & nn.24-25 (1977).

[10] The agency's ardor is illustrated by several cases which have been dismissed because of laches on the part of the EEOC. *See e.g., EEOC* v. *American National Bank*, 420 F.Supp. 181 (E.D. Va. 1973), *appeal docketed*, No. 74-2462 (4th Cir.); *EEOC* v. *C & D Sportswear Corp.*, 398 F.Supp. 300, 10 FEP Cases 1131 (M.D. Ga. 1975); *EEOC* v. *American Machine & Foundry, Inc.*, 13 FEP Cases 1634 (M.D. Pa. 1976); *EEOC* v. *J. C. Penney Co.*, 12 FEP Cases 640 (N.D. Ala. 1975); *EEOC* v. *South Carolina National Bank*, 12 FEP Cases 843 (D.S.C. 1976), *appeal docketed*, No. 76-1977 (4th Cir.); *EEOC* v. *Moore Group, Inc., supra*, 12 FEP Cases at 871.

Even assuming that an attorney's fees award would have discouraged pursuit of these suits, the response of these several courts would seem to be that the enforcement of Title VII would not thereby have been restricted unnecessarily.

From the foregoing, therefore, it is evident that the "private attorney general" rationale of the court below is not applicable to the EEOC." Moreover, it is unlikely that the proper enforcement of Title VII would be inhibited by the attorney's fees standard sought by petitioner Christiansburg.

As shown, as its basic argument, the employer urges the Court to apply the rule in *Newman* v. *Piggie Park* equally to both Title VII plaintiffs, and those defendants who prevail against the EEOC. Under this standard, attorney's fees generally would be available to all prevailing parties, absent special circumstances. 390 U.S. at 401. Should the Court not find this standard appropriate, however, the *Amicus*, EEAC, would urge the Court that the EEOC's "reasonableness" rather than its "good faith" should be the proper standard. Such a standard should be applied equally to both successful plaintiffs and defendants. There are several arguments favoring the "reasonableness" formula. Even in cases where courts have expressed concern about the agency's zeal in pursuing alleged violators (see footnotes 7 and 10 above), it is extremely doubtful that such actions could be shown to have been taken in bad faith. Thus, as the Court stated in *EEOC* v. *Western Electric Co.*, *supra*, if the good faith standard were applied, "then zealous EEOC attorneys would be encouraged to

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" Thus, the Second Circuit's decision in *Carrion* v. *Yeshiva University*, 535 F.2d 722, 726-729 (2d Cir. 1976), is distinguishable. There, the court concluded that the good faith standard set forth in *United States Steel* was applicable to an unsuccessful *private* plaintiff, and awarded attorney's fees to the defendant employer because of the plaintiff's meritless claim. Attorney's fees from the EEOC were not an issue.

abuse and circumvent the necessary administrative proceedings prior to the filing of a judicial action under Title VII. This Court will not encourage such unreasonable conduct." 10 FEP Cases at 1276. Accordingly, several courts have rejected the subjective *good faith* test and awarded attorney's fees when the agency's actions were deemed *unreasonable*. See *EEOC* v. *Western Electric*, *supra*; *EEOC* v. *South Carolina National Bank*, *supra*, —— F.Supp. ——, 12 FEP Cases at 1565; and *EEOC* v. *Service Container Corp.*, *supra*, 418 F.Supp. at 901. *And cf.*, *Kaye* v. *Burns* (*Arthur F.*), 411 F.Supp. 897, 904 (S.D.N.Y. 1976) (no attorney's fees available where the government's interest in withholding documents has "at least a reasonable basis" in law).

B. Successful Title VII Defendants Play an Important Role in Assuring That The Statute Is Properly Administered

As noted above, p. 7, both the court below and that in *U.S. Steel* adopted the "good faith" standard for awards of attorney's fees to prevailing defendants because "one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination." See Pet. App. 7-A and 519 F.2d at 364. This conclusion, however, ignores many legal and practical realities of Title VII litigation which other courts have recognized.

As a starting point, it has been noted that:

> the court has a legitimate role in protecting individuals from abuse of governmental power. The EEOC has more potential than private plaintiffs for serious abuse of defendants because of its

money, its pool of expertise, and its broad powers to compel production of records and cooperation. The EEOC also has the power to take actions which damage the interests of the complainant. Vining, *supra*, 1976 Wis. L. Rev. at 229.[12]

Accord: *EEOC* v. *South Carolina Bank*, *supra*, 12 FEP Cases at 1565 ("The awarding of reasonable attorney's fees as a part of the cost to the prevailing party is one way of putting some check on the ever expanding bureaucracy and its abuse of power").

Additionally, as the district court pointed out in a recent Title VII case, the function of a government attorney is somewhat different from that of a private attorney:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." [13]

It is clear, moreover, that courts alone cannot fulfill their function of governmental oversight, and that they often receive important assistance from defendants who have been accused improperly of statutory violations. See the cases cited above, nn. 7 and 10.

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[12] As noted above, p. 4, the dissent in the instant case felt that the same fees standard should apply to successful plaintiffs and defendants "[e]specially where the government is the plaintiff, with its limitless resources and sensitivity to the political winds of the moment. . ." (Pet. App. 13-A).

[13] See *EEOC* v. *New Enterprise Stone & Lime Co.*, *supra*, 15 FEP Cases at 29, quoting Mr. Justice Sutherland's remarks in *Berger* v. *United States*, 295 U.S. 78 (1934).

The decisions which have awarded attorney's fees against the EEOC (see n. 7, *supra*) strongly suggest that the successful defense against meritless EEOC-brought cases serve an important public policy in assuring that the government does not overstep the limits of its power and attempt to require defendants to take actions beyond that which the law requires.[14] It seems evident, therefore, that innocent party defendants who have assisted in this important public function should not thereafter be required to bear the financial burden of assuring that the government operates legitimately. It is the *Amicus*' position that these principles apply to successful defenses in general, and most assuredly when the agency proceeds in an "unreasonable" manner.[15]

C. The Complex and Costly Nature of Title VII Litigation Supports the Conclusion that Attorney's Fees Usually Should Be Awardable to Successful Defendants

There are other compelling reasons why an award of attorney's fees against the EEOC should be awardable as a general rule and not only when the agency

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[14] *See e.g.*, *EEOC* v. *Anchor Continental, Inc.*, *supra*, 15 FEP Cases at 93, where the court expressed its concern for the agency's attempts to "harass the defendant into making some type of settlement."

[15] *See generally*, *Securities & Exchange Commission* v. *Capital Counselors, Inc.*, 378 F.Supp. 224, 227 (S.D.N.Y. 1974), aff'd 512 F.2d 654 (2d Cir. 1975), where the court held that "where prosecution *or defense* of an action under the federal securities laws has been in furtherance of the purpose of those laws—protection of the public investor—then the parties bearing the costs of such prosecution *or defense* are entitled to reimbursement" (emphasis added).

has acted in "bad faith." These reasons derive from the complex, costly and often transitory nature of Title VII litigation and its governing principles. With the possible exception of antitrust cases, court cases brought under Title VII are among the most complex presented to our legal system. Individual claims of discrimination which are investigated by the EEOC commonly expand into class actions which involve allegations of discrimination not indicated by the charging party.[16] These class actions frequently grow to mammoth proportions and take years to investigate and litigate.[17] Such litigation often results in ultimate reversal or modification of the legal principles initially applied by the EEOC or lower courts.[18]

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[16] *See e.g., EEOC* v. *General Electric Co.*, 532 F.2d 359, 12 FEP Cases 21, 25 (4th Cir. 1976); and *EEOC* v. *D. H. Holmes Co., Ltd.*, No. 76-4184, slip op. at 4800-01, 4804 n.14, and 4806 (5th Cir. July 29, 1977), *petition for rehearing pending* (charges alleging discrimination against five individuals expanded by EEOC into a wide-ranging class action which the Fifth Circuit characterized as "an investigation in search of a plaintiff." *Id.*, at 4806).

[17] For example, this Court recently heard several such cases involving trial and appeal records of immense size. See *Teamsters* v. *United States*, and *T.I.M.E.-D.C.* v. *United States*, 45 U.S.L.W. 4506, 14 FEP Cases 1514 (1977); *East Texas Motor Freight* v. *Rodriquez*, 45 U.S.L.W. 4524, 14 FEP Cases 1505 (1977); and *United Air Lines* v. *McDonald*, 45 U.S.L.W. 4760, 14 FEP Cases 1711 (1977).

[18] In *Washington* v. *Davis*, 426 U.S. 229, 12 FEP Cases 1415, 1421 & n.12, this Court criticized several courts of appeals' decisions which were contrary to its holding. Also, the dissent in *Teamsters* v. *United States* pointed to several lower court decisions which it felt were at odds with the majority's interpretation of Section 703(h) of the Act. See 45 U.S.L.W. at 4520 n.2, 14 FEP Cases at 1537 n.2. Additionally, in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 13 FEP Cases 1657 (1976), the Court's ruling concerning pregnancy disability payments reversed not only the lower court (and several other courts, *sub silentio*), but also the EEOC's regulation on the matter.

In many instances, review by this Court produces guidelines for the processing of Title VII litigation which may require the remand or retrial of cases already completed.[19] Indeed, the decision in *Teamsters* v. *United States*, *supra*, established guidelines impacting on virtually every stage of Title VII litigation.

It is evident, therefore, that in an area of the law which is exceedingly complex, and where the governing legal principles are changing constantly, successful Title VII defendants incur ever-expanding legal costs in assisting the courts in determining the proper interpretation of the requirements of Title VII. Clearly, the successful defense against Title VII allegations which are proved meritless is extremely burdensome, even to larger employers who must make substantial internal adjustments to finance such litigation. And as several courts have recognized:

> unmeritorious complaints under the Act could produce *as serious a burden on commerce as the discrimination which it forbids*, and thus some measure of control should be vested in the courts toward the prevention of such a burden. *Bell* v. *Alamatt Motel*, 243 F.Supp. 472, 474 (N.D. Miss. 1965) (emphasis added).[20]

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[19] *See e.g., Sabala* v. *Western Gillette Inc.*, 516 F.2d 1251, 11 FEP Cases 98 (5th Cir. 1975), *judg. vacated and remanded* in light of the decision in *Teamsters* v. *United States*, 45 U.S.L.W. 3786, 14 FEP Cases 1686 (June 7, 1977).

[20] See also *United States* v. *Gray supra*, 319 F.Supp. at 873; and *EEOC* v. *Western Electric Co., supra*, 10 FEP Cases at 1277, both quoting *Bell* v. *Alamatt* with approval.

Moreover, it is important to recognize that, like the instant case, a substantial number of Title VII cases do *not* involve large, nationwide corporations that are better able to bear the costs of litigation than an economically deprived individual plaintiff. Rather, Title VII cases often pit small- to-medium-sized employers against the vaster resources of the federal government.[21] In those circumstances, the costs of mounting a successful defense not only constitute a "burden on commerce", but also may be crucial to the operations and even economic survival of the employer.

The *Amicus*, EEAC, shares the concern of several district courts that the costs of Title VII litigation have become so burdensome that an imbalance of resources available to the government and private defendants may be so great as to impair the proper enforcement of Title VII.[22] Citation to a few district court cases illustrates the point. In *EEOC* v. *South Carolina Bank*, *supra*, 12 FEP Cases at 1566, the court stated that:

> Many persons associated with EEOC do not seem to realize the expense involved in defending against its charges and producing the voluminous

[21] Many of the constituents of EEAC's trade association members are companies of this size, and have experienced the economic impact of such litigation first hand.

[22] As the Fifth Circuit has noted, Section 706(k) "was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation." *Johnson* v. *Georgia Highway Express*, 488 F.2d 714, 719, 7 FEP Cases 1, 5 (5th Cir. 1974). We submit that this proposition applies not only to private plaintiffs as in *Johnson*, but also, at minimum, to small-employer Title VII defendants.

> records demanded under its subpoenaes [sic]. This Court has tried a number of cases where the documents produced in the courtroom numbered in the thousands and had to be trucked to the courthouse all at the expense of the employer. The cases involving small businesses have practically shut down production while the litigation is in progress due to the number of witnesses that had to remain in the courtroom during the trial.

A similar concern was expressed in *EEOC* v. *Anchor Continental, Inc.*, *supra*, 15 FEP Cases at 94, 95:

> Having tried a number of Title VII suits this Court is well aware of the enormous amount of time, energy and money required to litigate in this area. (*Id.* at 94).
>
> • • • •
>
> The plaintiff [EEOC] shows no concern for the terrible financial burden it is placing upon the defendant; no concern for the disruptive effect its action may have upon the defendant's business or its personnel relations; no concern for the time defendant's employees must spend in gathering the information plaintiff has already requested and will in the future request; no concern for the effect this expense and disruption of the defendant's business may have upon the survival of the defendant as a going concern and the jobs of the 340 other people working for defendant without complaints of discrimination.
>
> Equally important is the plaintiff's utter disregard for the caseload of this Court and the enormous amount of court time required to try this type case. (*Id.*, at 95)

Accord: EEOC v. *New Enterprise Stone & Line Co., supra,* 15 FEP Cases at 29 ("It is not inconceivable that a small company could literally be put out of business by the cost of having to be represented at hearing after hearing over frivolous side issues."); and *EEOC* v. *Western Electric Co., supra,* 10 FEP Cases at 1277.

Because of these considerations, even if this Court should find that attorney's fees are not to be available generally to successful Title VII defendants, the *Amicus* urges the Court to endorse the fees standard set forth in *EEOC* v. *Service Container Corp., supra,* 418 F.Supp. 898. There, the court concluded that despite the EEOC's "good faith beliefs" in bringing the suit, "[c]onsiderations regarding Defendant's *size* and *financial stature* and the *impact* of this litigation *on its operation* dictate in the opinion of the Court that [the Defendant] should recover a reasonable attorney's fee herein" (*Id.*, at 901) (emphasis added).

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit below should be vacated, and the employer awarded attorney's fees.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 18 1977
MICHAEL RODAK, JR., CLERK

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Supreme Court of the United States

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE NATIONAL CHAMBER LITIGATION CENTER AS *AMICUS CURIAE*

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF FOR THE NATIONAL CHAMBER LITIGATION CENTER AS *AMICUS CURIAE*

STATEMENT OF INTEREST*

The National Chamber Litigation Center [hereinafter the Center] is a non-profit, tax-exempt corporation organized and operated under the laws of the District of Columbia. Center members include trade associations and corporations of all sizes, representing a cross section of employees throughout the United States. The Center is organized and operated as a busi-

* Written consent of the parties to the filing of this brief has been obtained as required by Rule 42(2) of the Supreme Court Rules.

ness-oriented, public interest law firm, with its attorneys serving as counsel in matters important to commerce and industry.

The Center's membership is comprised of employers subject to the provisions of the Equal Employment Opportunity Act, including those provisions relating to the payment of attorneys' fees and costs at issue here.

The issue of awards of attorneys' fees is crucial to the Center's own operations. Entirely dependent upon membership dues and other voluntary contributions for its fiscal well-being, the Center's only other potential source of operating revenues rests in the award of attorneys' fees upon conclusion of litigation. Judicial application of a restrictive standard to prevailing employer/defendants discriminates against the Center as well as others representing employer interests in Title VII cases. Where statutes permitting awards of attorneys' fees to prevailing parties exist, they must apply on an equal basis to each prevailing party. To do otherwise would be an invidious discrimination of the variety justly struck down by this Court in the past.

STATUTE INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

QUESTION PRESENTED

Should the standard applied by district courts in exercising their discretion in awarding attorneys' fees to a prevailing defendant in a Title VII action under the Civil Rights Act of 1964, as amended, (42 U.S.C. §2000e) be the same as the standard for a prevailing plaintiff?

ARGUMENT

I

THE HISTORY OF ATTORNEYS' FEES IN THE UNITED STATES AS WELL AS THE LEGISLATIVE HISTORY AND PLAIN MEANING OF SECTION 706(k) ESTABLISH THAT PREVAILING DEFENDANTS SHOULD BE AWARDED ATTORNEYS' FEES ON THE SAME BASIS AS PREVAILING PLAINTIFFS.

A. History of Attorneys' Fees

In the absence of statutory or contractual provisions to the contrary, a prevailing litigant in the United States is not ordinarily entitled to collect attorneys' fees from the loser. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967).[1] Two nonstatutory exceptions to this "American Rule" have been developed by the courts in the exercise of their equitable powers. *Hall* v. *Cole*, 412 U.S. 1, 4-5 (1973).

The first exception is that attorneys' fees will be allowed to a successful litigant, where the "litigation confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an

[1] The *amicus* relies on Petitioner's statement of the case and its recitation of the Opinion Below and Jurisdiction.

award that will operate to spread the costs proportionately among them." *Id.* quoting *Mills* v. *Electric Auto-Lite,* 396 U.S. 375, 393-394 (1970). The second exception to the American Rule is that federal courts can award attorneys' fees to a litigant where the opponent has acted "in bad faith, vexatiously, wantonly or for oppressive reasons." *Hall* v. *Cole, supra; Alyeska Pipeline Service Co.* v. *Wilderness Society, supra* at 258-259.

In addition to these "common law" exceptions to the American Rule, Congress has made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Alyeska Pipeline Service Co., supra* at 260. These statutes greatly expand the exceptions to the American Rule by providing for the payment of attorneys' fees in a wide diversity of cases. It is important to emphasize that the statutory expansion is in addition to and not a codification of the common law exceptions. This Court stated in *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, footnote 4 (1968):

> 4. If Congress' objective had been to authorize the assessment of attorney's fees against defendants who made completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'

Thus, the Court must start with a statutory standard beyond the bad faith exception provided by common law. *See also, Bell* v. *Alamatt Motel,* 243 F. Supp. 472, 474 (N.D. Miss. 1965).

These statutory attorneys' fees provisions fall into several categories depending on what Congress was attempting to accomplish in each statute. Some statutes allow only prevailing plaintiffs to recover fees, but under other statutes, either party can recover if he or she prevails. Furthermore, under some statutes, the payment is mandatory. For example, under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1973), payment of attorneys' fees to prevailing plaintiffs is mandatory,[2] while under Section 812 of the Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1974), attorneys' fees may be awarded only to a prevailing plaintiff at the discretion of the court.[3] Numerous statutes similar to that in the instant case allow the payment of attorneys' fees, at the discretion of the court, to the prevailing party.[4] Thus, as this court has held:

> Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine. *Alyeska Pipeline Service Co., supra* at 262.

It is evident that Congress knew how to treat plaintiffs and defendants differently where there existed a reasonable basis for that difference. Thus, where no such difference exists, the Court should not infer different standards.

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[2] *See also,* 52 Stat. 1069, as amended by 29 U.S.C. § 216(b), *Alyeska, supra* at note 34.

[3] *See also,* Labor Management Reporting and Disclosure Act, § 501, 29 U.S.C. § 501(b) (1975).

[4] *See, e.g.,* Copyright Act, § 1, 17 U.S.C. § 116 (1952); Trust Indenture Act of 1939, § 323, 15 U.S.C. § 77 www(a) (1971); Securities Act of 1933, § 11, 15 U.S.C. § 77k(e) (1971).

B. Attorneys' Fees Under the Civil Rights of 1964.

Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1974) provides that:

> In any action . . . the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee. . . .

Where the plain meaning of a statute is clear on its face, it is unnecessary to refer to the legislative history. *United States* v. *Standard Brewery,* 251 U.S. 210, 217 (1920); *United States* v. *Oregon,* 366 U.S. 643, 648 (1961). Where the language of the statute is clear, it is not for a court to say that a legislative act encompasses a more restrictive meaning. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 200-201 (1976); *United States* v. *Kelly,* 519 F.2d 251, 256 (8th Cir. 1975). The meaning of this section is clear and unequivocal on its face; if either party, except the Commission, prevails, it is entitled to be considered for an award of attorneys' fees. *Van Hoomissen* v. *Xerox Corporation,* 503 F.2d 1131, 1133 (9th Cir. 1974).[5] No distinction is drawn by the statute between prevailing plaintiffs and prevailing defendants. In *Newman* v. *Piggie Park Enterprises, supra* at 402, this Court set the test for award of attorneys' fees under Title II of the Civil Rights Act of 1964.[6] There, the court held that a prevailing plaintiff "should ordinarily recover his attorney's fees unless special circumstances would render such an award unjust". This test has been held appropriate in awarding attorneys' fees to successful plaintiffs in Title VII litigation. *Lea* v. *Cone Mills,* 438 F.2d 86, 88 (4th Cir. 1971). Despite this, the Fourth Circuit in the instant litigation ignored the plain meaning of Section 706(k) and the Supreme Court's instruction in *Newman* v. *Piggie Park Enterprises, supra,* that the statutory standard went beyond the bad faith common law exception.

[5] *Accord, United States Steel Corp.* v. *United States,* 519 F.2d 359, 362 (3rd Cir. 1975).

[6] The language of the attorneys' fees provision of Title II is almost identical to that here. 42 U.S.C. § 2000a-3(b) (1974). The only differences in language are that Section 202(b) refers to "the United States", while § 706(k) refers to "the Commission or the United States" and Section 202(b) begins "In any action commenced pursuant to this title", while 706(k) begins "In any action or proceeding under this title."

C. Legislative History of Section 706(k)

Although resort to legislative history is not necessary to determine the meaning of this statute, a review of this confirms its plain language. The legislative history of the Civil Rights Act of 1964 establishes that Congress had a dual purpose in providing that prevailing parties in Title VII litigation could obtain attorneys' fees. Those purposes were to encourage plaintiffs of limited means to bring meritorious actions, and equally important, to deter the bringing of lawsuits without foundation. *Grubbs* v. *Butz,* 548 F.2d 973, 975 (D.C. Cir. 1976); *U.S.* v. *Gray,* 319 F. Supp. 871, 872-73 (D.R.I. 1970), *quoting with approval, Bell* v. *Alamatt Motel, supra.*

The only discussion in the legislative history[7] which is truly illuminating as to the intent of Congress in en-

[7] Although not part of its official history, Title VII has its origin in many laws going back to 1944. *See,* Hickey, *Government Regulation of Union Racial Policies,* 7 B.C.Ind. and Comm. L. Rev. 191 (1966). However, the principal thrust for the present statute was

acting the attorneys' fee provision is the statement made by Senator Pastore on the Senate floor during debate on the Civil Rights Act of 1964:[8]

> The purpose of this provision in the modified substitute is to discourage frivolous suits. Here the court within its discretion is given power to order payment of attorneys' fees to the prevailing party. First of all, it is within the discretion of the court. *It is not favoritism toward one party, as against the other. When a person realizes that he takes the chance of having attorneys' fees assessed against him if he does not prevail, he will deliberate before he brings suit. He will make certain that he is not on frivolous ground.* (emphasis added) 110 Cong. Rec. 14214 (1963).

Senator Lausche concurred in this assessment stating:

> that language was inserted in the bill to deter the bringing of lawsuits without foundation.
>
> * * *
>
> In this bill we wanted to discourage the bringing of lawsuits and we therefore provided that attorney's fees shall be allowed only in favor of the victorious party. 110 Cong. Rec. 13668-69 (1963).

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a bill introduced in 1963 by Representative Celler. Section 204(b) of that proposal provided for attorneys' fees for "the person aggrieved". Hearing before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st Sess., Part 1, page 653 (1963). The substitution of the phrase "prevailing party" for "the person aggrieved" in the statute introduced the following year indicates a conscious awareness that plaintiffs and defendants should be treated equally.

[8] Senator Pastore's remarks were directed toward the attorneys' fee provision of Title II of the Act. As previously noted that provision is essentially identical to the one in Title VII. *See, supra,* n. 6.

The remarks of Senators Pastore and Lausche regarding this interpretation of the provision were undisputed.[9]

Relying upon the comments of the two Senators, the court in *United States* v. *Gray, supra* at 873, agreed that prevailing plaintiffs and defendants should be treated equally and awarded attorneys' fees to the defendants.[10] Similarly, the United States Court of Appeals for the District of Columbia Circuit has stated:

> But second, and *equally important,* Congress intended to deter the bringing of lawsuits without foundation by providing that the 'prevailing party'—be it plaintiff or defendant—could obtain legal fees. Were this not Congress' intent, it would have authorized fees only to prevailing plaintiffs, or to any party as it has done in many other circumstances (emphasis added). *Grubbs* v. *Butz, supra,* at 975-76.

In light of the foregoing, it is clear that Congress was as concerned with the rights of successful defendants vis-a-vis attorneys' fees as it was with those of successful plaintiffs and that fees should be awarded to successful parties on the same basis.

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[9] See also remarks of Senator Miller that "ambulance chasing" is discouraged by the fact that attorneys' fees are awarded to the prevailing party. 110 Cong. 14213-14 (1963).

[10] The district court in *Gray* appears to have misapplied the standard set by this court in *Newman* v. *Piggie Park, supra.* There, this Court said that absent exceptional circumstances, successful plaintiffs should be awarded attorneys' fees in Title II cases. The district court, although noting *Piggie Park* and expressing its belief that plaintiffs and defendants should be treated equally, applied a "meritless standard" in awarding fees to the defendant. *See, infra,* p. 22.

This conclusion is buttressed by the legislative history of the Equal Employment Opportunity Act of 1972[11] which amended Title VII of the 1964 Civil Rights Act. The most significant change wrought by the 1972 Act was, of course, to vest the Equal Employment Opportunity Commission with the power to sue to enforce the Act, thereby eliminating the prior Act's almost total reliance on individuals pursuing relief with their own resources.[12]

The 1972 legislative history indicates no disagreement either with the meaning ascribed to the attorneys' fees language by Senator Pastore, *supra,* or with the interpretations of the courts in awarding attorneys' fees on an equal basis to plaintiffs and defendants. Although several attempts were made in 1972 to amend the attorneys' fee section of the 1964 Act, the final bill left it unchanged. While not ultimately adopted, the proposed amendments are instructive as to Congress' interpretation of the 1964 Act.

In this regard, the Senate had adopted an amendment which would have mandated the payment of attorneys' fees to small businesses and unions in any Title VII actions brought by the EEOC or the government, unless it was found that the defense had been put forth in bad faith. *Leg. Hist.* 1177-1180, 1185.[13] The Senate receded from the amendment in conference, apparently because of concern that it would encourage

[11] 86 Stat. 103 (1972).

[12] *See,* Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 G.W.L.R. 824 (1972).

[13] *Leg. Hist.* references are to the Committee Print. Legislative History of the Equal Employment Opportunity Act of 1972 (November 1972).

unworthy defenses and because it was not related to the outcome of the litigation. *Leg. Hist.* 1183-84, S. Rep. No. 92-681, 92nd Cong., 2d. Sess. 19 (1972). Yet the concern of Congress with the heavy financial burden imposed on defendants was clear.

This concern is also indicated by the House's rejection of a bill which would have amended Section 706(k) to allow only "prevailing plaintiffs" to be granted attorneys' fees. Under that proposal, defendants would have been able to recover attorneys' fees only under the American Rule. This revision of the bill was replaced on the House floor by a substitute which left 706(k) unchanged.[14] Rejection of the "prevailing plaintiff" language indicates that Congress believed section 706(k) required a test other than the bad faith test of the American Rule. If Congress had felt that the traditional American Rule left defendants adequately protected, no purpose would have been served in dropping the Committee revision of the bill.

Thus, it is significant that the attorneys' fee section was attacked from both sides; by those who wanted to restrict it to plaintiffs, and those who wished to make it mandatory for defendants. That the amendment emerged unscathed is certainly indicative of the fact that Congress believed the original provision applied equally to both plaintiffs and defendants.

D. Other Attorneys' Fees Provisions in the Civil Rights Act.

We have already noted that the attorneys' fees provision of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000 a-3(b), Section 204, contains language es-

[14] *Compare* H. Rep. No. 92-238, 92nd Cong. 1st Sess. 32 (1971) *with* 117 Cong. Rec. 31979-80, 32110-13 (1971).

sentially identical to that in Title VII. Moreover, an examination of the attorneys' fee provision in Title III of the Civil Rights Act of 1964, 42 U.S.C. § 2000b-1 (1974)[15] which contains no provision for actions by private plaintiffs (actions can only be brought by the Attorney General) is illuminating.

There Congress provided that attorneys' fees could be imposed upon the government, but the government was not allowed to collect fees. Thus, Congress was not concerned with allowing private defendants to recover attorneys' fees from the government where it is an unsuccessful plaintiff as it was in the instant case. But more importantly, it indicates that Congress in enacting the Civil Rights Act was fully able to structure a provision which provided that attorneys' fees could be awarded differently based on the identity of the parties. Because such a provision is conspicuous by its absence in Section 706(k), it should not be so construed.

E. Conformity with Other Prevailing Party Statutes

The decision of the Fourth Circuit below not only conflicts with the plain meaning of Section 706(k) and its legislative history, but also with the interpretation accorded similar provisions of other statutes. In this regard, the United States Court of Appeals for the Second Circuit in applying the attorneys' fees provision of Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k(e) (1971)[16] held that the test to be applied to both plaintiffs and defendants was to be the

[15] 42 U.S.C. § 2000b-1 provides: "In any action or proceeding under this subchapter the United States shall be liable for costs, including a reasonable attorneys' fee, the same as a private person."

[16] 15 U.S.C. § 77k(e) authorizes a fee award if "the court believes the suit or the defense to have been without merit."

same. *Aid Auto Stores, Inc.* v. *Cannon,* 525 F.2d 468, 471 (2d Cir. 1975). In *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 484 F.2d 1331, 1338 at n. 7 (1st Cir. 1973), the court held that under Section 304(d) of the Clean Air Act, 42 U.S.C. § 1857(h)-2d (1969),[17] the parties should be treated equally in awarding fees, since "... the identity of the party ... would be of little moment." Moreover, under other acts with attorneys' fees provisions similar to those here, there are no indications of any different treatment of plaintiffs and defendants. Noise Control Act of 1972, § 12, 42 U.S.C. § 4911(d) (1977); Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C. § 1132 (g) (1975).

We submit that there is no rational reason for ignoring the intent of Congress and treating prevailing defendants any differently under this statute than they are under any of the other statutes with similar provisions.

II

PUBLIC POLICY SUPPORTS THE AWARD OF ATTORNEYS' FEES TO PREVAILING DEFENDANTS ON THE SAME BASIS AS TO PREVAILING PLAINTIFFS.

The plain language of Section 706(k), the legislative history of the 1964 Civil Rights Act and the 1972 amendments thereto, and an analysis of the evolution by statute and case law of the right to attorneys' fees, all support the position that in Title VII cases, plaintiffs and defendants deserve equal treatment when a court exercises its discretion to award attorneys' fees. The same position is reached as a matter of public

[17] Section 304(d) permits an award "to any party, whenever the Court determines such an award is appropriate".

policy. There is no generic difference between plaintiffs and defendants, and the potential award of attorneys' fees should be focused as much on encouraging meritorious litigation as on discouragement of suits without merit. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra.*

A. The Title VII Respondent

The potential of a Title VII lawsuit confronts not only giant industries, but also individuals employing as few as 15 persons per working day for twenty calendar weeks a year. Section 701(a), (b), 42 U.S.C. § 2000e (a) & (b) (1974).[18] The broadly phrased statutory language of Title VII encompasses non-profit organizations and charitable groups such as hospitals, churches, schools and community service organizations. *See, e.g., Mosby* v. *Webster College,* 423 F. Supp. 615 (E.D. Mo. 1976); *Willett* v. *Emory & Henry College,* 427 F. Supp. 631 (W.D. Va. 1977); *McClure* v. *Salvation Army,* 460 F.2d 553 (5th Cir. 1972) *cert. den.* 409 U.S. 896 (1972), *reh. den.* 409 U.S. 1050 (1972); *Equal Employment Opportunity Commission* v. *Metropolitan Atlanta Girls Club, Inc.,* 416 F. Supp. 1006 (N.D. Ga. 1976); and *Garnett* v. *Holy Cross Hospital,* —— F. Supp. —— 14 FEP Cases 354 (D. Md. 1975).[19]

In all of these cases, the defendant organization had to bear its own attorneys' fees, and in all of these cases

[18] The Department of Labor estimates that 98% of the businesses subject to state unemployment laws employ 99 or less employees. U.S. Department of Labor, Bureau of Labor Statistics, Employment and Wages, First Quarter of 1975, p. 20 (1976).

[19] This and subsequent citations refer to the cases as reported in the Bureau of National Affairs Fair Employment Practices Cases. These cases have not been officially reported.

except in *Metropolitan Atlanta Girls Club* the defendant prevailed. It is fair to assume the money for these fees came from funds that would otherwise have been directed toward education, medical care and community service. As the United States Court of Appeals for the First Circuit noted:

> For private colleges and universities, not only do heavy litigation expenses impose a financial burden which may ultimately be passed on in some measure to students or be absorbed to the detriment of some educational function, but the process of involving every department in depth in fact finding and defense may well be deeply disruptive to the institution's mission. In both a material and non-material sense they are fragile, not perhaps in their capacity to endure but in their capacity to remain effective while enduring. This is not to suggest that other institutions, such as hospitals or small businesses, may not be similarly burdened. *Lamphere* v. *Brown University,* —— F.2d ——, slip opinion, p. 11 (1st Cir. April 25, 1977)

The size of fees to defend a Title VII case which is a burden even for large businesses, is a financial disaster for small businesses and non-profit organizations. This fact has been judicially recognized in at least one reported decision in which the EEOC argued against attorneys' fees for a prevailing employer defendant on the basis that its suit was brought in good faith:

> Plaintiff reads something into the pertinent statute, *supra,* which is not there. The Court does not question Plaintiff's good faith but this is not all that should be considered under the Statute in the exercise of discretion on this point. Considerations regarding Defendant's size and financial stature and the impact of this litigation on its operation dictate in the opinion of the Court that it should

recover a reasonable attorneys' fee herein. *Equal Employment Opportunity Commission* v. *Service Container Corp.*, 418 F. Supp. 898, 901 (W.D. Ok. 1976)

The following cases, while involving awards of attorneys' fees to successful plaintiffs, are illustrative of the burden of successfully defending a Title VII suit. For example in *Equal Employment Opportunity Commission* v. *Enterprise Ass'n.*, 542 F.2d 579 (2nd Cir. 1976), an award of $50,000 in attorneys fees was affirmed, while the charging party had originally sought $128,092. An interim fee of $125,000 was awarded following a request for $263,038 in fees in *Patterson* v. *American Tobacco Co.*, 11 FEP Cases 586 (E.D. Va. 1976). A minority class action brought $35,000 in attorneys' fees in *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), U.S. App.Pending, No. 76-1060 while $27,244 went to plaintiff's attorneys for a sex bias class action in *Ostapowicz* v. *Johnson Bronze Co.*, 12 FEP Cases 1468 (W.D. Pa. 1974). In *Rosenfeld* v. *Southern Pacific Railway Co.*, 4 FEP Cases 72 (D.C. Cal. 1971), a non-class sex discrimination case brought $30,000 in attorneys' fees, and $20,000 in fees for plaintiffs plus $5,000 for intervenors was awarded in *Taylor* v. *Goodyear Tire & Rubber Co.*, 6 FEP Cases 672 (D.C. Ala. 1973). Intervenors' attorneys were more fortunate in *Alaniz* v. *California Processors, Inc.*, 13 FEP Cases 738 (N.D. Cal. 1976) recovering $35,000 in a Title VII proceeding. And in at least one Civil Rights Act case, attorneys' fees exceeded $200,000. *United States* v. *United States Steel Corporation*, 7 FEP Cases 320 (D. Ala. 1973).[20] Some

[20] In non-civil rights cases, fees have reached ten million dollars. Wolfrom, *The Antibiotics Case*, 1976 Research Journal 251, 327-37, 359.

courts have even offered incentive bonuses in Title VII cases. *Parker* v. *Matthews*, 13 FEP Cases 595, 602-603 (D. D.C. 1976).

When Title VII defendants incur similar expenses in opposing invalid lawsuits, they should be entitled to a fee award on the same basis as a successful plaintiff. In the absence of being able to recover these fees, the financial burden could conceivably cause the collapse of small and non-profit employers. The net result of such a collapse would be a loss of jobs for the company's employees, and, in the case of the non-profit organization, termination of important community services.

B. The Title VII Plaintiff

Title VII provides that suit may be filed by the Equal Employment Opportunity Commission or by the person aggrieved. Of course, when the Commission loses a case and is held responsible for the prevailing defendant's attorneys' fees, the courts need not be concerned with that award discouraging the Commission from instituting future actions, since as one court noted in awarding $160,000 in attorneys' fees against the Department of Labor in a sex discrimination class action, "the United States . . . has infinite ability to pay." *Copeland* v. *Usery*, 14 FEP Cases 1677, 1678 (D. D.C. 1977). Furthermore, Congress in enacting the Civil Rights Act recognized in Title III, discussed *supra*, that the government could afford to pay a prevailing defendant.

In Title VII cases where the government is not the plaintiff, individuals will often posture their cases as class actions in which substantial recoveries are sought. Policy reasons exist for making these class action plain-

tiffs responsible for attorneys' fees in cases where they are unsuccessful. The availability of a class designation may actually generate lawsuits, since the conduct of some attorneys in actions under Rule 23 of the Federal Rules of Civil Procedure indicate that they believe "the rule was adopted for their benefit rather than for the multitude of individuals comprising the class whose rights they were presumably vindicating." *Leibman* v. *J.W. Petersen Coal & Oil Co.*, 63 F.R.D. 684, 701 (N.D. Ill. 1974). Similar judicial concerns also exist in Title VII class actions. *Magana* v. *Platzer Shipyard, Inc.*, 14 FEP Cases 561, 570-575 (S.D. Tx. 1977). *See also Developments in the Law-Class Actions*, 89 Harv. L. Rev. 1318 (1976).

Since members of the class must "opt in" in order to share benefits in a Title VII class action suit, there is no reason why the class should be eligible for the benefit without assuming equal responsibility for defendant's attorneys' fees and costs should the action fail. The risk could spread among the class, which, by definition, must be of sufficient size in order to meet the numerosity requirements of Rule 23. *Weathers* v. *Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974). Moreover, individual plaintiffs and class action plaintiffs in Title VII cases are often assisted in their efforts to obtain redress. *EEOC* v. *Enterprise Ass'n, supra.* These groups, such as unions, have a greater capability of spreading the litigation costs among their membership than do small employers and non-profit corporations. In light of the above, it is clear that the standard for attorneys' fees should be the same for successful plaintiffs and defendants in Title VII actions.

C. Society Benefits from the Defense of Actions as Well as Their Prosecution.

No social goals warrant making a distinction between plaintiffs and defendants insofar as the award of attorneys' fees is concerned, a fact which has been recognized. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra.* Evenhanded treatment of the imposition of attorneys' fees encourages both plaintiffs and defendants to consider the merit of bringing or contesting a lawsuit, while a more permissive standard for fee awards for plaintiffs than defendants could serve to discourage a defendant from vigorously opposing a suit. Assertion of proper defenses is an essential ingredient in the proper development of the law, since a defendant is optimally situated to assist the court in considering all aspects of the issues being litigated.

Moreover, an effective Title VII defense will often inure to the good of a company's employees since benefits held by certain employees are often challenged in Title VII actions. *See e.g., International Brotherhood of Teamsters* v. *United States,* —— U.S. ——, 97 S. Ct. 1843 (1977). In the absence of an active defense, the employees' rights to these benefits will often go unprotected. In addition, civil rights actions can generate claims for reverse discrimination when an unlawfully imposed remedy for past bias limits opportunities for persons who are not members of the protected class. *Cf. Chance* v. *Board of Examiners,* 534 F.2d 993, 998 (2nd Cir. 1976).

A vigorously presented defense brings these important issues into sharper focus for the court. Lastly, the failure of an employer to present adequate defenses

may result in severe restrictions on the income of the business to the detriment of both the enterprise and its shareholders. *NAACP* v. *Federal Power Commission*, 425 U.S. 662 (1976). A vigorously presented defense brings these important issues into sharper focus for the court.

III

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES EQUAL TREATMENT OF PLAINTIFFS AND DEFENDANTS IN REGARD TO THE AWARD OF ATTORNEYS' FEES.

Although the Fifth Amendment to the United States Constitution contains no "equal protection" clause equivalent to that of the Fourteenth Amendment, the Fourteenth Amendment's equal protection clause is applicable to the Federal government through the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). If a classification would be invalid under the equal protection clause of the Fourteenth Amendment, it is also inconsistent with the due process clause of the Fifth Amendment. *Johnson* v. *Robison*, 415 U.S. 361 (1974). Thus, unjustifiable discrimination against women may violate the Fifth Amendment on equal protection grounds. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). Discriminatory enforcement of a neutral statute can also be a violation of the equal protection requirement which "prohibits discriminatory administration of valid statutes." *United States* v. *Falk*, 479 F.2d 616, 618 (7th Cir. 1973); *Shock* v. *Tester*, 405 F.2d 852 (8th Cir. 1969), *cert. den.* 394 U.S. 1020 (1969), *reh. den.* 395 U.S. 941 (1969).

Obviously not all legislative distinctions present questions of Constitutional violations. As this Court noted in *Matthews* v. *Lucas*:

> Statutory classifications, of course are not *per se* unconstitutional; the matter depends upon the character of the discrimination and its relation to legitimate legislative aims. —— U.S. ——, 96 S. Ct. 2755, 2761 (1976).

Thus, although classifications may be made to pass constitutional muster they must not treat similarly situated persons differently. *Califano* v. *Goldfarb*, —— U.S. ——, 97 S. Ct. 1021, 1027 (1977); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) and *Reed* v. *Reed*, 404 U.S. 71 (1971).

The language of Section 706(k) demonstrates that Congress has not specified different standards for prevailing plaintiffs and prevailing defendants in Title VII cases. The courts below, however, took it upon themselves to impose an unreasonable classification upon petitioner which placed it in a less favored position in violation of the Fifth Amendment to the Constitution of the United States. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886).

IV

THE APPLICABLE STANDARD IS EQUAL TREATMENT

In light of the plain meaning of section 706(k), the legislative history of that section, and the relevant policy considerations, it is mandatory that prevailing defendants be treated the same as prevailing plaintiffs when awarding attorneys' fees. Accordingly, the test for award of attorneys' fees expressed by this Court in *Newman* v. *Piggie Park, supra,* should be applied to prevailing defendants in Title VII actions. That is that fees should ordinarily be awarded, unless special circumstances would render such an award unjust.[21]

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[21] Even if this Court should not agree that the *Piggie Park* test is

The application of an objective test such as this eliminates continuing litigation over the meaning of a subjective standard, such as the common law bad faith exception followed below. Moreover, as one court has stated:

> Under the standard proposed by plaintiff [subjective good faith] in its opposition brief, no attorneys' fee could ever be awarded against the Commission as long as the EEOC attorneys subjectively felt that their litigation zeal was exercised in good faith for the noble cause of employment equality. *EEOC* v. *Western Electric Co., supra,* at 1276.

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appropriate, we submit for the reasons stated *supra* pp. 3-5, 11, that the court below was clearly in error in applying a bad faith test. *EEOC* v. *South Carolina National Bank,* 12 FEP Cases 1565, 1566 (D.S.C. 1976); *EEOC* v. *Western Electric,* 10 FEP Cases 1275, 1276 (D. Md. 1975).

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the cause remanded for determination of an appropriate attorneys' fee.

Respectfully submitted,

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FILED
SEP 30 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 76-1383

CHRISTIANSBURG GARMENT COMPANY,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid and gratuitously to Negroes suffering injustice by

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*Letters of consent to the filing of this Brief from counsel for the petitioner and the respondent have been filed with the Clerk of the Court.

reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid soceity. the NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as amicus curiae in this Court and other courts, in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving Title VII of the Civil Rights Act of 1964 and discrimination in employment generally.* In addition, the Fund has been primarily responsible for the development of the law regarding counsel fee awards under the various Civil Rights Acts having represented plaintiffs in the leading cases of Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968);

*E.G.. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas v. Green, 411 U.S. 792 (1973); Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Northcross v. Memphis Board of Education, 412 U.S. 427 (1973); and Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). As counsel for plaintiffs in civil rights cases we have a direct interest in the resolution of the question before the Court in this case.

SUMMARY OF ARGUMENT

I.

The award of counsel fees to prevailing Title VII defendants as a matter of course would have a chilling effect on the filing of complaints by plaintiffs, regardless of the merits of their cases. Such a result is precluded by this Court's decision in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), which held that the purpose of the counsel fee provisions in the Civil Rights Act of 1964 was to "encourage individuals injured by racial discrimination to seek judicial relief."

II.

Congress intended to encourage the bringing of private lawsuits to enforce the provisions of the 1964 civil rights act. On the other hand, it sought to discourage frivolous and vexatious litigation by allowing counsel fees to prevailing defendants under those limited circumstances. The counsel fee provision in Title VII must be

read in light of the intent of Congress as expressed both in 1964 and in more recent civil rights counsel fee enactments.

ARGUMENT

I.

An Award of Counsel Fees to Defendants in Cases Brought Under the Civil Rights Act Is Inconsistent with Newman v. Piggie Park Enterprises.

The resolution of the issue raised by the present case, whether prevailing defendants in Title VII actions are to receive counsel fees on the same basis as are prevailing plaintiffs, will determine whether or not Title VII of the Civil Rights Act of 1964 remains as a viable remedy for those on whose behalf it was passed. Title VII involves complex and difficult issues, particularly in cases that are brought as across-the-board class actions challenging systemic practices of employers. From the time of the filing of the complaint to the completion of trial, up to 5 years may be required because of the difficult problems such litigation presents. Thus, the plaintiffs must be prepared to analyze in depth a variety of practices that may impinge on employment opportunities, including tests,[1/]

2/ See, e.g., Griggs v. Duke Power Co, 401 U.S. 424 (1971).

methods of promotions[2/] and the like. Statistical and computer analyses of data, the use of expert witnesses to analyze information, to testify concerning the validity of tests, and to suggest alternative ways of organizing a work force so as to remove obstacles to equal employment opportunities are essential parts of litigation.

Needless to say, the bringing and maintaining of such litigation involves substantial resources not only in personnel but in funds. Lawyers' fees and expenses, expert witness fees and expenses, salaries of research analysts and computer personnel, and other funds expended as ordinary costs of litigation must be found. Such resources are far beyond the reach of ordinary Title VII plaintiffs, who are most likely blue collar workers at the lowest rung in the salary scale. Indeed,it is because of their position economically that such workers have sought out the aid of the courts to achieve equality of opportunity for themselves and others similarly situated. Even in class actions, groups of workers rarely have the funds necessary to carry out their side of the litigation with-

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2/ See, e.g., Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976).

out the assistance of organizations such as the Legal Defense Fund. Thus, their own lawyers are either on the staff of a civil rights organization, or are attorneys in private practice working in cooperation with such organizations who receive only a minimal fee (see, e.g., NAACP v. Button, 371 U.S. 415 (1963)), but who do have the expectation of an eventual award of counsel fees under 42 U.S.C. §2000e-5(k).

It was precisely these concerns - the burden on privarte plaintiffs - that led Congress to enact a counsel fee provision as part of Title VII.[3/] In Newman v. Piggie Park Enterprises,

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3/ Congress recognized at the time it passed the Civil Rights Act of 1964 that a significant part of the burden of enforcing the Act would fall on private plaintiffs. Although the legislative history of the counsel fee provisions in the Civil Rights Act of 1964 is not lengthy, it indicates that Congress' main concern was to provide an incentive for plaintiffs to file lawsuits to enforce the rights established by the Act. Thus, concern was expressed over the fact that private plaintiffs lacked resources to bring and presecute the kind of actions that would be necessary under the Act. The counsel fee provisions were inserted for the specific reason to provide fee shifting so that a successful plaintiff would be able to obtain his counsel fees. See, 110 Cong. Rec. 12722 June 4, 1964).

390 U.S. 400 (1968), this Court held that the Congressional purpose of encouraging private enforcement of the national policy embodied in Title II of the Civil Rights Act of 1964 required that counsel fees be awarded to prevailing plaintiffs as a matter of course. This rule has subsequently been applied by this Court to private actions brought to integrate schools within the scope of 20 U.S.C. §1617 (Northcross v. Memphis Board of Education, 412 U.S. 427 (1973); Bradley v. Board of Ed. of Richmond, 416 U.S.696 (1974)), and by the courts of appeals in cases arising under Title VII of the Civil Rights Act of 1964 (see, e.g., Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974)); Robinson v. Lorrillard Corp., 444 F.2d 791 (4th Cir. 1971); Rosenfeld v. Southern Pacific Co., 519 F.2d 527 (9th Cir. 1975)).

We urge that the award of counsel fees to defendants as a matter of course is precluded by this Court's decision in Newman and would be clearly inconsistent with Congressional intent in enacting the counsel fees provisions as part of the various civil rights acts.

In the first place, it is obvious that given the fact that Title VII plaintiffs usually cannot afford to bear the costs of their own side

of litigation, it would be impossible for them to bear the costs of the defendant's side as well.[4/] This, however, is the result sought by the petitioner in the present case. The Court must keep in mind that this case arises in a posture which may not present this particular problem, since it involves an agency of the federal government. The Equal Employment Opportunity Commission, of course, does not have the economic problems faced by private Title VII plaintiffs. However, the arguments made by petitioner would apply with equal force to cases brought by private plaintiffs, and therefore the Court must decide the issue in the light of the policy considerations that led Congress to pass the attorneys' fees provision to begin with as decided by Newman.

4/ Indeed, this Court has explained one of the rationales for the prevailing American rule in terms of the effect of routine fee-shifting on poor litigants:

> In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. Fleischmann v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

The effect of the threat of paying counsel fees to a defendant who prevails in a Title VII action as a matter of course will necessarily mean that many plaintiffs who may have valid claims, or whose claims are substantial enough to warrant full consideration by the courts, will simply either not bring law suits or will so restrict their law suits as to render enforcement of the Act ineffective. Civil rights attorneys in advising potential plaintiffs whether or not to bring an action will have no choice but to warn them that they may become personally liable for the counsel fees and expenses of their adversaries even when those adversaries have enormous resources.[5/] An attorney could not in good conscience permit plaintiffs of limited resources to be driven to bankruptcy if they do not prevail.

These concerns are not speculative, but arise from our experiences since 1965, the effective date of Title VII, in handling hundreds of Title VII actions against employers ranging from the United States Steel Corporation to

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5/ See e.g., Ford v. United States Steel Corp., 520 U.S. 1043 (5th Cir. 1975); Rodgers v. United States Steel Corp., 508 F.2d 152 (3rd Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Sherrill v. J.P. Stevens & Co., 410 F.Supp. 770 (W.D.N.C. 1975).

smaller concerns, and from the largest industrial unions down to small locals. The issue must be viewed from the perspective of the plaintiff and of plaintiff's counsel in light of the Newman ruling that the purpose of the counsel fee provision is to encourage litigation.

A plaintiff has no assurance that he will prevail when he, or she, is deciding whether to initiate litigation. His access to facts is limited; typically, he only knows that he has not gotten a job or promotion. The underlying facts are in the possession of the prospective defendant and can only be obtained after discovery.[6/] Even after the raw data has been obtained, sophisticated analysis is required to determine precisely in what ways employment practices deny equal opportunity.

The law of Title VII has developed gradually and has taken dramatic shifts from time to time.[7/] Thus, it is difficult for a plaintiff

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6/ See, e.g., Rich v. Martin Marietta Corp., 522 F.2d 333, 342-45 (10th Cir. 1975).

7/ For example, only last term this Court held, contrary to most courts of appeals, that seniority systems did not violate Title VII if they simply perpetuated the effects of pre-Act discrimination in the absence of an intent to discriminate. International Brotherhood of Teamsters v.

to predict that a case will be won even if the facts seem clear. Similarly, district court judges themselves often err in deciding cases, requiring reversal by the appellate courts.[8/] If a court, after a full trial of the evidence can make a mis-judgment, a plaintiff should not be penalized if he assesses his case wrongly before a complaint is ever filed.

Even though a plaintiff may have a valid claim on the merits, he may lose becasuse of a procedural bar not easily foreseen.[9/] Also to be considered is the result if a plaintiff prevails on some issues but not all. Are counsel fees to be apportioned, so that those

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7/ Cont'd.
United States, ____ U.S. ____, 52 L.Ed.2d 396 (1977)).

8/ See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976); Donaldson v. Pillsbury Co., 554 F.2d 825 (8th Cir. 1977); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975).

9/ See, e.g., Johnson v. Railway Express Agency, 421 U.S. 454 (1975); United Air Lines v. Evans, ____ U.S. ____, 52 L.Ed.2d 571 (1977).

awardable to indigent plaintiffs are cancelled out by those awardable to a corporate defendant?

To catalogue the difficulties facing a prospective Title VII plaintiff and his counsel in trying to foresee whether they will ultimately be successful, is to demonstrate the destructive effect of the rule argued for by petitioner here. In short, the only purpose and effect a rule awarding counsel fees to prevailing defendants as a matter of course would be to discourage and chill the private enforcement of Title VII. Such a result would be totally inconsistent with Newman and, as will be shown below, with Congressional policy.

II.

A Different Standard for Award of Counsel Fees To Plaintiffs and Defendants Is Required By The Policy Considerations Enunciated in the Civil Rights Acts and Is Not Inconsistent With the Language of Title VII.

As discussed above, Congress' purpose in enacting a counsel fee provision as part of Title VII was to encourage plaintiffs to bring litigation. Clearly, a provision which would give counsel fees as a matter of course to prevailing defendants would defeat the congressional purpose,

since potential plaintiffs would have to weigh the possibility of an award of significant attorneys' fees against them even in a case which presented substantial issues and which deserved to be filed and prosecuted in court. The lower courts have therefore adopted the rule that the standard for assessing fees is different for plaintiffs and defendants. Thus, in conformity with Newman v. Piggie Park Enterprises, supra, they have held that a prevailing defendant may obtain counsel fees only when the court finds that the action was brought in bad faith, for vexatious reasons, and for the purpose of harassment. See, e.g., Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976); United States Steel Corp. v. United States, 519 F.2d 359 (3rd Cir. 1975); Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975).

Petitioner seeks to refute these decisions by maintaining that the plain meaning of the statute shows that the standard for both plaintiffs and defendants is to be the same; i.e., since the statute makes no distinction on its face, no distinction can be read into it by the courts. We would urge that the statute is not nearly as plain as petitioner contends, and that the problem with petitioner's position is that

it focuses on the wrong part of the statute. The fact that both parties may get counsel fees on some occasions, does not in any way, as petitioner contends, mean that they are to get them on the same basis. The part of the statute which deals with that question is the language stating that the court may "in its discretion" award fees.

The question then becomes what standards are to govern the court's discretion in a particular case. The statute does not speak to that specifically, certainly not in its language, and it is wholly appropriate to turn to the legislative history for guidance as to what the standards for the exercise of discretion should be. When one does so, it becomes apparent that the standards should not the same if the court is deciding whether to grant counsel fees for the plaintiff as opposed to granting them for the defendant. As this Court has discussed in Newman v Piggie Park, supra, as well as in cases following it dealing with other counsel fees statutes in civil rights cases, such as Northcross v. Memphis Board of Education, 412 U.S. 427 (1973) and Bradley v. School Board of Richmond, 416 U.S. 696 (1974), the standard for prevailing plaintiffs is that counsel fees are

to be awarded except in unusual circumstances so that the Congressional purpose of encouraging litigation would be carried out. As we have discussed at length above, to allow counsel fees as a matter of curse to prevailing defendants would have exactly the opposite effect and would discourage litigation, and thus run contrary to congressional purpose. Discouraging frivolous or vexatious litigation, however, is wholly consistent with congressional purpose, both because no valid purpose at all would be furthered by such litigation, and by discouraging it the courts would be free to focus their attention on those cases which present substantial issues arising under the civil rights laws.[10/]

10/ During the Congressional debates, concern was expressed that the counsel fees provision could encourage "ambulance chasing", and could lead to the bringing of frivolous law suits for the purpose of obtaining a fee. In response, it was pointed out that the "prevailing party" language would permit an award to defendants in vexatious and insubstantial suits and thus discourage the bringing of totally unmeritorious litigation. See, 110 Cong. Rec. 14201, 14213-14 (June 17, 1964).

Petitioner presents another argument that allegedly supports its reading of the statute. That is, if the standard for defendants is harassment, bad faith, or vexatious litigation, there is no need to have the statute read "prevailing party", since the defendant would be entitled to counsel fees under that standard pursuant to the American rule in any case. Thus, it is argued, the statute would have no meaning with regard to defendants. This conclusion does not follow, however. If the statute read "prevailing plaintiffs" and counsel fees awards were limited to such plaintiffs, then the statute would bar counsel fees on behalf of defendants under all circumstances. Under such a reading, the American rule would be abrogated for defendants in civil rights cases since even in instances where litigation was frivolous or brought in bad faith they could not be awarded by the courts.[11/]

It is certainly clear that Congress's view now is that the standard should be different for

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11/ See, e.g., Byram Concretanks, Inc. v. Warren Concrete Products Co., 374 F.2d 649 (3rd Cir. 1967).

plaintiffs and defendants in civil rights cases. In 1976 Congress passed the Civil Rights Attorneys' Fees Act of 1976, designed to fill gaps created by the decision of this Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). In that decision, this Court disapproved decisions of the lower federal courts applying the "private attorneys general" standard, enunciated with regard to Title II and 20 U.S.C. §1617, to actions brought under 42 U.S.C. §1981, 1982 and 1983, the post-Civil War Reconstruction civil rights acts.[12/] Congress was concerned that this result created an anomaly in that under the post-1964 civil rights acts fees were awarded to plaintiffs as a matter of course, whereas in pre-1964 civil rights act cases counsel fees were awardable only under the much more restrictive American rule. As was pointed out in the committee reports, and often during the debates on the 1976 Act, employment discrimination cases could be brought either under §1981 or under Title VII.[13/] However, under the

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12/ 421 U.S. at 270, n.46.

13/ See H. Rep. No.94-1558, 94th Cong., 2d Sess., pp. 2-5 (1976); S. Rep. No. 94-1011, 94th Cong., 2d Sess., pp. 1-4 (1976); 122 Cong. Rec. H12165 (daily ed. Oct.1, 1976)(Remarks of Rep. Seiberling).

Alyeska decision, counsel fees were awardable only under Title VII. Thus, even though an action might deal with the same issues and serve exactly the same public purpose, counsel fees could not be obtained.

It was specifically to clear up this anomaly and to bring about uniformity for all civil rights actions with regard to counsel fees that the 1976 Act was passed.[14/] During the course of the enactment of the statute, in both the House and the Senate extensive attention was given to decisions of this and the lower courts interpreting the counsel fees provisions under the post-1964 Civil Rights Acts. Newman v.

14/ The Senate Report stated the purpose of the Act thus:

> This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws. S. Rep. 94-1011, 94th Cong. 2d Session, p. 1 (1976).

Piggie Park Enterprises, supra, was cited as establishing the proposition that plaintiffs were to be given counsel fees as a matter of course when they prevailed.[15/] Contrariwise, the decisions in Carrion v. Yeshiva University, supra and United States Steel Corp.v. United States, supra, were cited as establishing that the standard for defendants was different.[16/] That is, defendants were to obtain counsel fees only when the action was found to be brought in bad faith and for harassment.

Indeed, during the debates the question was raised as to whether it was necessary to specify "prevailing parties" if all the defendants could get what they were entitled to under the American rule to begin with. The answer was given that it was not the Act's intent to foreclose defendants from getting counsel fees under all circumstances. It was pointed out that the United States had suggested to the House committee that counsel fees be limited to "prevailing plaintiffs". The suggestion was rejected because Congress still wished to deter frivolous lawsuits by plaintiffs,

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15/ See, e.g., id. at p. 3.

16/ See, id. at p. 5.

and thus allow defendants to get attorneys fees under the standard which prevailed under the American rule.17/

In both the Committee reports and repeatedly on the floor of the House and the Senate the question of standards for awards of counsel fees was discussed. It was consistently stated that Congress intended that a different standard apply, that it intended that the same standard apply in the 1976 Act that was required by the courts under their interpretation of the 1964 Act,and that the purpose was to bring about uniformity with regard to all civil rights actons. Thus, given this legislative history, it is indisputable that, for example, in an action brought under §1981 for equal employment, the defendant could receive counsel fees only upon a showing of bad faith and harassment. If a contrary result were reached in the present action, however, the wholly anomalous result would be that there would again be a lack of uniformity in the standards applied in civil rights cases. Plaintiffs would simply be encouraged to file

17/ See, e.g.; 122 Cong. Rec. H12162 (daily ed. Oct.1, 1976 (Remarks of Rep. Kastenmeier); 122 Cong. Rec. S16491 (daily ed. Sept. 23, 1976) (Remarks of Sen. Tunney).

their lawsuits under §1981 and thereby not to file administrative complaints with the EEOC, avoiding Title VII completely, a result that would be wholly contrary to Congressional intent.18/

Conclusion

For the foregoing reasons, the decision of the Court below should be affirmed.

Respectfully submitted,

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18/ Thus Rep. Railsback, one of the sponsors of the bill, stated on the floor of the House just prior to passage:"It is not the intent of Congress nor is it the intent of this statute to encourage persons to sue directly under section 1981 rather than using the services provided by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act.Congress has established the EEOC to remedy individual complaints as well as patterns and practices of illegal discrimination and has authorized the Commission to sue on behalf of the plaintiffs." 122 Cong. Rec., H12161 (daily ed. Oct.1,1976).

Supreme Court, U. S.
FILED
OCT 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the Nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson,

* The parties' letters of consent to the filing of this brief are being filed with the Clerk pursuant to Rule 42(2).

Mississippi, and eight other cities, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The primary objective of the Lawyers' Committee is to help develop the legal resources necessary to enforce fully the civil rights of minorities and poor people. Pursuant to that objective, we seek to enlist the services of the private bar in aid of the individual rights secured by the Constitution and federal civil rights laws. That effort, in our extensive experience, is heavily dependent upon the availability of court-awarded attorneys' fees to plaintiffs who successfully carry on litigation to enforce congressional civil rights policies. Statutory authorization for such awards is a familiar legislative mechanism for encouraging private enforcement of congressional policies. The correct interpretation and implementation of such legislation is critical to a substantial part of the Committee's work. Consequently, for several years we have operated an Attorneys' Fees Project as an adjunct to our substantive litigation activities. Through that project we have provided assistance to Congress in connection with its consideration and passage of civil rights attorneys' fees legislation,[1] and we have participated in litigation involving the construction of such legislation.[2]

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[1] For example, we presented testimony to Congress during its deliberations on, *inter alia*, the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, amending 42 U.S.C. § 1988.

[2] In addition to numerous cases in the courts of appeals, we have filed *amicus* briefs with this Court in *Stanton* v. *Bond*, 429 U.S. 973 (1976); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974).

We thus offer our views on the question before the Court: what standards should guide federal district courts in the exercise of their discretion, under § 706 (k) of Title VII of the Civil Rights Act of 1964, to grant or deny applications for attorneys' fees by prevailing defendants in cases brought by the federal government (here the EEOC)? Beyond our general interest and experience with respect to that precise question, we are vitally concerned with the contention of petitioner and the *amici* which support it that the same standard which ordinarily entitles a prevailing private Title VII plaintiff to an award of attorneys' fees should apply with equal force to *all* prevailing Title VII *defendants*, irrespective of whether the suit is brought by the government or by private plaintiffs. Our alarm at this proposition stems from our intense involvement in employment discrimination litigation—through our privately-funded Government Employment Project (providing representation to federal, state and local government employees claiming unlawful employment discrimination), through our Equal Employment Project (which, pursuant to our contract with the EEOC, provides representation to private-sector plaintiffs), and through the general litigation activities of our Mississippi office and other local affiliates. As we will show in the Argument section, our experience is that the position advanced by petitioner, if adopted by the Court, would effectively foreclose a large amount of the most significant Title VII litigation, including that being pursued by the Lawyers' Committee, thereby seriously frustrating national policies of the highest order.

Respondent EEOC's brief is a persuasive and sufficient discussion of the issues in this case in terms of the structure, purpose and legislative history of Title VII. We accordingly submit this short brief only to address, from our perspective, two general aspects of the

controversy which may not be covered fully by respondent: to emphasize, on the basis of our extensive experience, that the allowance of fee awards to prevailing Title VII defendants as a matter of course in private-plaintiff suits would defeat the purposes of the Act; and to show, from our familiarity with attorneys' fees legislation, that the judgment below is wholly consistent with the entire range of congressional activity on the subject.

The Lawyers' Committee therefore files this brief as a friend of the court urging affirmance.

ARGUMENT

1. Introduction

This case requires the Court, for the first time, to establish in suits brought by the federal government, standards governing the exercise of discretion by federal district courts presented with requests by prevailing defendants for awards of counsel fees pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).[3] The position taken by petitioner and supported by *amici* is somewhat broader, however, in that it would have the Court decide the "prevailing defendant" question without regard to whether the suit was initiated by the federal government, as here, or by private litigants.[4] We are satisfied that respondent EEOC's brief,

[3] The statute reads as follows:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

[4] *Amicus* Equal Employment Advisory Council emphasizes factors of discretion which are peculiar to government-initiated litigation, but petitioner and *amicus* National Chamber Litigation Center suggest no such limitation on their broad contentions that the same guidelines which control "prevailing plaintiff" awards should control "prevailing defendant" awards.

with which we are in complete agreement, adequately deals with the precise question presented by the case (i.e., the standards governing fee awards to prevailing defendants when the government is the Title VII plaintiff) as well as the broader argument made by petitioner which would not distinguish between cases in which the government is the plaintiff and those in which a private party is the plaintiff. There are, nevertheless, some additional points we wish to make with respect to the broader argument. We also direct the Court's attention to Congress' consistent approach to the question of attorneys' fees in numerous statutory schemes.

Preliminarily, we respond to the argument that the plain language of § 706(k) makes resort to legislative history unnecessary (Pet. Br. at 4; NCLC Br. at 6), thereby mandating, in petitioner's words, that "the discretionary standard . . . is the same whether the prevailing party be plaintiff or defendant" (Pet. Br. at 11). This argument simply misses the point. We do not dispute that the same exercise of judicial power—the exercise of equitable "discretion"—is involved in making fee awards to prevailing defendants as is involved in making such awards to prevailing plaintiffs. But it hardly follows that "discretion" is synonomous with the blind application of a mechanical rule that takes no account of the purpose of the congressional scheme, that ignores the nature of the litigation, and that pretends that a defendant has the same characteristics as a plaintiff and that all plaintiffs are alike. Petitioner's argument thus overlooks settled doctrine: "when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes. . . ." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). The standards developed by the courts below for the exercise of discretion under § 706(k) "must

therefore be measured against the purposes which inform Title VII." *Id.*

Consistent with the principles later discussed in *Albemarle Paper*, the Court, in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), examined the national policies embodied in the Civil Rights Act of 1964 and adopted the following standard to govern the exercise of discretion by district courts under the Act when presented with fee claims from successful plaintiffs: such plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402.[5] The *Newman* approach certainly is applicable to this case, and faithful application of that approach will lead to a determination that ordinarily a prevailing Title VII *defendant* should *not* recover attorneys' fees. We show that a contrary result would (1) virtually nullify the private-enforcement scheme of Title VII, and (2) be at odds with Congress' uniform approach to attorneys' fees legislation.

2. The Standard Petitioner Seeks Would Thwart the Purpose of Title VII

At the time of the grant of certiorari in this case the courts of appeals which had addressed the question were unanimous in their conclusion that prevailing Title VII defendants should not, as a matter of course, recover attorneys' fees from losing plaintiffs.[6] These courts reasoned that the fundamental purposes of Title VII required that different considerations be taken into account in the exercise of § 706(k) discretion in "prevailing defendant" cases, and that such a defendant should recover attorneys' fees from a losing plaintiff only when the plaintiff's litigation conduct amounted to what we generically describe as "bad faith." The reasons for this different standard are obvious. These courts are unwilling to assume that Congress, having provided for attorneys' fees as a means of enabling aggrieved parties to bring enforcement suits, *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, 390 U.S. at 401-02; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 415, simultaneously intended to deter those aggrieved parties by making them face the prospect of paying their opponents' fees if the suit, though brought in good faith, is unsuccessful. Such a rule would deter not only the frivolous but the meritorious suits as well.

To attribute to Congress the self-defeating motive inherent in petitioner's argument would practically termin-

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[5] Although *Newman* involved Title II's fee provision, § 204(b), 42 U.S.C. § 2000a-3(b), the language of that section is virtually identical to § 706(k) and the *Newman* rationale is equally applicable to Title VII. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 415; *see also Northcross* v. *Board of Education of Memphis*, 412 U.S. 427 (1973).

[6] In addition to the decision below (550 F.2d 949), *see Bolton* v. *Murray Envelope Corp.*, 553 F.2d 881, 884 n.2 (5th Cir. 1977); *Grubbs* v. *Butz*, 548 F.2d 973, 975 (D.C. Cir. 1976); *Carrion* v. *Yeshiva University*, 535 F.2d 722 (2d Cir. 1976); *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1063-64 (8th Cir. 1975); *United States Steel Corp.* v. *United States*, 519 F.2d 359 (3d Cir. 1975); *Van Hoomissen* v. *Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974) (unpublished order of Nov. 6, 1974); *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1096 (6th Cir. 1974). Since the Court's grant of certiorari here, however, two courts of appeals' decisions have held that prevailing defendants should recover fees under the same standard as prevailing plaintiffs—i.e., ordinarily. *EEOC* v. *Bailey Co., Inc.*, —— F.2d ——, No. 76-1045 (6th Cir. Sept. 20, 1977); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 558 F.2d 742 (5th Cir. 1977). Both of these decisions rely on the flawed "plain language" argument advanced by petitioner and its friends (*see* p. 5, *supra*). In addition, the court in *EEOC* v. *Bailey Co., Inc.*, like the petitioner here (*see* Pet. Br. at 9), argues that "[i]f the objective of Congress [in § 706(k)] had been to authorize the assessments [*sic*] of attorneys' fees against a private plaintiff who acts in bad faith, then no new statutory provision would have been necessary because the American rule allows recovery in such cases even without a statute." Slip Op. at 32 n.10. This argument, too, is erroneous. *See* note 12, *infra*.

ate private enforcement of Title VII, thereby eliminating the major force in the implementation of the law and its purposes.[7] One needs only to glance at the Title VII decisions handed down during recent Terms of this Court to know that Title VII litigation is both factually and legally complex. Even when the legal principles are relatively well-settled, their proper application frequently will turn on factual details that cannot be known prior to the commencement of suit and extensive discovery. On the other hand, even when the facts are comparatively clear-cut at the pre-complaint stage, numerous questions of law arise about which there are reasonable differences of opinion—questions, both substantive and procedural, which divide this Court as well as the lower courts, and which sometimes go for years without authoritative resolution. *See, e.g., International Brotherhood of Teamsters* v. *United States*, —— U.S. —— (1977). The great majority of these difficult factual and legal questions have been presented and resolved in the context of groundbreaking private litigation.[8] Such litigation is essential

[7] As evidenced by Congress' grant of litigation authority to the EEOC in 1972, as well as by the EEOC's enormous backlog of complaints, the congressional hope of 1964—that equal employment opportunities would be attained through the administrative process—has not borne fruit. Hence, litigation is the primary hope for fulfillment of Title VII's promises. That hope, in turn, rests to a very large extent on suits initiated by private plaintiffs, as a brief review of the latest advance sheets will quickly demonstrate. In fiscal year 1976, 5,321 Title VII actions were filed. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS 204 (1977). The latest information available from the EEOC, that for fiscal year 1975, shows that the agency filed only 180 Title VII cases and intervened in only 36 others. EEOC, 10TH ANNUAL REPORT at 10 (1976).

[8] Consider, for example, Judge Sobeloff's oft-cited opinion in *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). That case was initiated by private plaintiffs (who were ultimately successful) despite an EEOC administrative determination "that there was no reasonable cause to believe that the Act [Title VII] had been violated." 444 F.2d at 800. It is not irrational to hypothesize that *Robinson*, and numerous similar cases, would never have been filed if the plaintiffs had been informed of a real possibility that the end of the long litigation road, though travelled in good faith, would be an award requiring payment of the defendant's substantial litigation expenses and attorneys' fees.

to the public policies embodied in Title VII: "there is an interest in having novel theories expounded and prior holdings extended, all of which increases the possibility that plaintiffs in a particular case may not prevail and that their counsel may not be paid."[9] We cannot overemphasize our conviction, confirmed by our experience in representing the victims of employment discrimination, that such important litigation will not be brought if this Court holds that a prevailing Title VII defendant should ordinarily recover attorneys' fees from an unsuccessful plaintiff. Faced with that prospect, most of our present and former clients (who generally are economically disadvantaged), in our judgment, would have elected not to seek judicial relief and run the very real risks of further economic injury in the form of an award of fees to the prevailing defendant. The prospect of such an award, morever, would even chill the willingness to sue of a plaintiff with an apparently strong case. *Cf. Parker* v. *Califano*, —— F.2d ——, 14 EPD ¶ 7637 at p. 5134 (D.C. Cir. June 30, 1977).[10]

The obvious practical impact of the proposition asserted by petitioner, therefore, is so patently at variance with

[9] *United States* v. *Local Union No. 3, IUOE*, 6 EPD ¶ 8946, at p. 6034 (N.D. Calif. Nov. 9, 1973).

[10] Even the prospect of having to pay an opponent's court costs can have a chilling effect on the pursuit of judicial relief, *Jaspers* v. *Bernstein*, C.A. No. 76-1411 (D.D.C. Sept. 19, 1977). Congress was obviously concerned with the potential for such adverse effects on the employment rights of impecunious Title VII plaintiffs: in addition to the attorneys' fees authorization of § 706(k), the Act, by § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), also authorizes the district courts to appoint attorneys for plaintiffs and to allow them to proceed in *forma pauperis*.

"'the large objectives of the Act,'" *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 416, that it cannot survive "measure[ment] against the purposes which inform Title VII." *Id.* at 417. In the absence of some unequivocal statement to the contrary from Congress, and clearly there is none,[11] the Court ought not to dismantle Title VII

[11] The *amicus* brief of the National Chamber Litigation Center argues that, in the course of enacting the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, the House of Representatives rejected "a bill which would have amended § 706(k) to allow only 'prevailing plaintiffs' to be granted attorneys' fees." NCLC Br. at 11. This description does not accurately reflect the action of the House. While H.R. 1746 as reported by the Committee did include the change described, its major thrust was to provide for administrative enforcement of the Act by means of a cease-and-desist procedure in the EEOC. H.R. REP. No. 92-238, 92d Cong., 1st Sess. (1972). *See* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 61-131 (Senate Committee Print, 92d Cong., 2d Sess.) [hereinafter, "LEGISLATIVE HISTORY"]. The Committee report simply stated the fact of the changed language, but did not indicate any view that the difference in language would cause any differences in the law, or would do anything but make explicit what Congress had intended implicitly in 1964. The minority report objected to the change on the ground that it would be "contrary to the rule in most jurisdictions; and may constitute an incentive for harassment suits and a 'disincentive' to respondents not to resist ill-founded claims." LEGISLATIVE HISTORY, *supra*, at 91-92 and 125.

Representatives Erlenborn and Mazzoli offered a substitute, H.R. 6760, which relied exclusively on court enforcement and would have allowed the EEOC to bring suit, which barred relief for any class members who had not themselves filed charges of discrimination or been named in charges filed by other persons, and which made Title VII the exclusive remedy for claims of discrimination in employment. LEGISLATIVE HISTORY, *supra*, at 132-47. Virtually all of the debate in the House involved the wisdom of a cease-and-desist procedure as opposed to court enforcement, the wisdom of abolishing remedies under Executive Order 11246, 30 Fed. Reg. 12319 (1965), which requires nondiscrimination by government contractors, the legitimacy of the imposition of "goals and timetables" or of "quotas" under the Executive Order, the wisdom of abolishing the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), as remedies for employment discrimination, and the wisdom of the practical abolition of class actions in Title VII cases. LEGISLATIVE HISTORY, *supra*, at

in the manner contemplated by petitioner's argument. [illegible] now show that petitioner's burden is made [illegible] difficult by Congress' consistent approach to [illegible] fees legislation.

3. Congress Has Consistently Intended Party-"Neutral" Attorneys' Fees Authorizations To Be Implemented in Accordance With the Standards Adopted in the Judgment Below

The traditional American common-law rule, with certain distinct and narrow equitable exceptions, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975),[12] has each party to a lawsuit bear his own at-

189-324. The House ultimately adopted the Erlenborn substitute, *id.* at 314, but without one word having been said in the debate about the "prevailing plaintiff" language in the original H.R. 1746. Indeed, the only reference in the debate to fee awards is a statement by Representative O'Hara that an aggrieved party "is now guaranteed attorneys' fees and costs if he wins." *Id.* at 264.

The legislative history thus indicates that the House never adverted to the proposed change in § 706(k) when deliberating H.R. 1746 and the Erlenborn substitute, and that its action in adopting the substitute was entirely independent of this proposed change. In view of the fact that during these same sessions Congress was addressing the question of attorneys' fees to prevailing defendants in connection with other legislative schemes and indicating its view that such defendants should not ordinarily recover fees (*see* notes 15-19, *infra*, and accompanying text), the inference is strong that Congress did not desire a different standard in Title VII cases.

[12] The petitioner and at least one lower court (*see* note 6, *supra*) argue that the "bad faith" standard adopted by the courts in the instant case renders the "prevailing party" language of § 706(k) superfluous since courts have inherent power—the "bad faith" exception to the American rule—to award fees in cases of "bad faith" litigation. This argument ignores the fact that when Congress does pass one-way legislation authorizing fees to plaintiffs only, it is generally deemed to have eliminated the courts' equitable discretion to award fees on any non-statutory ground in a case arising under such a statute. *See Byram Concretanks, Inc.* v. *Warren Concrete Products Co.*, 374 F.2d 649 (3d Cir. 1967). Hence, the "prevailing party" langauge in Title VII was necessary in order to preserve courts' power to award fees to defendants who are faced with "bad faith" litigation by plaintiffs.

torneys' fees, whatever the outcome. This contrasts with the practice in most other countries, where those who prevail in any type of case ordinarily recover their counsel fees. Congressional statutes which have authorized court-awarded attorneys' fees have never been meant to change the American rule, but simply to provide plaintiffs with an additional remedy as an adjunct to statutes declaring significant national policy. *See Meeker* v. *Lehigh Valley R.R.*, 236 U.S. 412 (1915). This has been true not only in statutes which by their terms authorize fees only to plaintiffs but also in statutes which are nominally "neutral," as with Title VII. Congress has, especially in recent years, frequently authorized fees to the "prevailing party," "any party," or the like, and has given those terms a settled meaning by explaining them in the reports and floor debates of at least nine statutes. That settled meaning involves discretionary standards for awarding fees to prevailing plaintiffs (whom Congress desires to recover fees as a matter of course, absent exceptional countervailing circumstances) that meaningfully differ from the standards controlling awards to successful defendants (who, in the absence of unreasonable litigation conduct on the part of the plaintiffs, should ordinarily not recover attorneys' fees). Congress has repeatedly emphasized this theme.

Thus, as Congress said in its Conference Report on the Consumer Product Safety Commission Improvements Act, 15 U.S.C. § 2073,[13] in explaining why fees are to be liberally awarded to plaintiffs but not to defendants:[14]

> The standard for awarding costs to a prevailing defendant is not the same as for a plaintiff because, if it were, the risk of bringing suit under these sections could be so great as to frustrate the purposes

[13] § 2073 authorizes the district courts to award fees "[i]n any action . . . in the interest of justice. . . ."

[14] S. REP. No. 94-251, 94th Cong., 2d Sess. 23 (1975).

> of the sections. However, in exceptional circumstances, costs might be awarded to defendants where they must "defend against unreasonable, frivolous, meritless, or vexatious actions * * *", *United States Steel Corp.* v. *United States*, 385 F. Supp. 346, 348 (W.D. Pa. 1974). Where plaintiff's proceeding is brought in good faith or on the advice of competent counsel, costs would ordinarily be denied to a prevailing defendant. *Richardson* v. *Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), aff'd 468 F.2d 951 (5th Cir. 1972).

In enacting the attorneys' fees provision of the Marine Protection Act, 33 U.S.C. § 1415(g)(4), which provides for fees to "any party, whenever the court determines such award is appropriate," Congress said:[15]

> Furthermore, in issuing a final order in any such suit the court may award certain costs of litigation to any party when it concludes, in its discretion, that such an award is appropriate (e.g., if the plaintiff shows that the suit was meritorious, and not filed for the sake of mere harassment). On the other hand, if the court concludes that the purpose of the suit was harassment, the court may award such costs to the defendant.

And in the Water Pollution Control Act Amendments, containing similar language, 33 U.S.C. § 1365(d), it was explained that:[16]

> Concern was expressed that some lawyers would use section 505 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This

[15] S. REP. No. 92-451, 92d Cong., 2d Sess. (1971).

[16] S. REP. No. 92-414, 92d Cong., 2d Sess. 81 (1971).

> should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.
>
> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party.

To the same effect are: the Clean Air Act ("any party"),[17] discussed in *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974); the Noise Pollution Control Act ("any party"),[18] patterned after the Clean Air Act[19]; the Voting Rights Act Extension of 1975 ("prevailing party")[20]; the Toxic Substances Control Act ("in any action")[21]; the Revenue Sharing Amendments ("prevailing party").[22]

Congress has recently and forcefully reaffirmed this approach. In the first statute ever passed dealing solely with attorneys' fees, the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, amending 42 U.S.C. § 1988, which uses the same "prevailing party" language as § 706(k), Congress has presented the most detailed legislative history to date on the purposes underlying attorneys' fees authorizations in remedial statutory schemes. This history is replete with explanations of the limited

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[17] 42 U.S.C. § 1857h-2(d).

[18] 42 U.S.C. § 4911(d).

[19] *See* S. REP. No. 92-1160, 92d Cong., 2d Sess. 8 (1972).

[20] 42 U.S.C. § 1973*l*(e). *See* S. REP. No. 94-295, 94th Cong., 1st Sess. 40-41 (1975).

[21] 15 U.S.C. §§ 2618-20. *See* 122 CONG. REC. S4416-17 (dailey ed. March 26, 1976) (remarks of Senator Tunney).

[22] 31 U.S.C. § 1244(e). *See* 122 CONG. REC. S15725 (dailey ed. Sept. 13, 1976) (remarks of Senator Brooke).

availability of fee awards to prevailing defendants.[23] The Report of the House Judiciary Committee explains why the "prevailing party" language was used:[24]

> when the Justice Department testified in support of H.R. 9552, the predecessor to H.R. 15460, it suggested an amendment to allow recovery only to prevailing plaintiffs. Assistant Attorney General Lee thought the phrase "prevailing party" might have a "chilling effect" on civil rights plaintiffs, discouraging them from initiating law suits. The Committee was very concerned with the potential impact such a phrase might have on persons seeking to vindicate these important rights under Federal law. In light of existing case law under similar provisions, however, the Committee concluded that the application of current standards to this bill will significantly reduce the potentially adverse affect on the victims of unlawful conduct who seek to assert their federal claims.

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[23] While not dispositive, the legislative history of the 1976 Act and the other statutes discussed above certainly is relevant to the ascertainment of congressional intent with respect to the earlier-passed Title VII fee provision. *See generally Parker* v. *Califano*, *supra*, 14 EPD ¶ 7637 at pp. 5137 & 5141 n.11, and authorities there discussed; *cf. New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 416 n.19 (1973). Moreover, as this Court has noted in the specific context of civil rights attorneys' fees legislation, "[t]he similarity of langauge . . . [between two fee provisions passed at different times] is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross* v. *Board of Educ. of Memphis*, 412 U.S. 427, 428 (1973). Finally, a holding in this case inconsistent with the clear legislative intent in the 1976 Act would have bizarre consequences. For example, how would a district court decide a prevailing defendant's motion for fees in a private-plaintiff employment discrimination case brought pursuant to both Title VII and 42 U.S.C. § 1981 (*see Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975)), if the Title VII standard were different from the one applicable to § 1981 by virtue of the 1976 amendment to 42 U.S.C. § 1988?

[24] H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 6 (1976).

Following a discussion of the standard used to award fees to prevailing *plaintiffs*, citing *Newman* v. *Piggie Park Enterprises, Inc., supra*, the report goes on: [35]

> the courts have developed a different standard for awarding fees to prevailing defendants because they do "not appear before the court cloaked in a mantle of public interest." *United States Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3rd Cir. 1975). As noted earlier such litigants may, in proper circumstances, recover their counsel fees under H.R. 15460. To avoid the potential "chilling effect" noted by the Justice Department and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely "to harass or embarrass" the defendant. *United States Steel Corp.* v. *United States, supra* at 364. If the plaintiff is "motivated by malice and vindictiveness," then the court may award counsel fees to the prevailing defendant. *Carrion* v. *Yeshiva University*, 535 F.2d 722 (2d Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, *Wright* v. *Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975); see also *Richardson* v. *Hotel Corp of America*, 332 F. Supp. 519 (E.D.La. 1971), *aff'd without published opinion*, 468 F.24 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes.

The Senate Judiciary Committee Report is also unequivocal and persuasive: [36]

[35] *Id.* at 7.

[36] S. REP. No. 94-1011, 94th Cong., 2d Sess. 4-5 (1976) (footnote omitted). *See also* 122 CONG. REC. S16280 (remarks of Sen. Bumpers) (daily ed. Sept. 21, 1976); *id.* at S16431 (exchange between Sens. Abourezk and Hathaway) (daily ed. Sept. 22, 1976); *id.* at S16491 (Sen. Tunney) (daily ed. Sept. 23, 1976); *id.* at S17050-51 (Sens. Tunney and Kennedy) (daily ed. Sept. 29, 1976); *id.* at H12156 (Rep. Bauman), H12159-60 (Rep. Drinan), H12162 (Rep. Kastenmeier), H12165-66 (Rep. Seiberling) (daily ed. Oct. 1, 1976).

> It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. *Richardson* v. *Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F.2d 951 (5th Cir. 1972). (A fee award to a defendant's employer, was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. *United States Steel Corp.* v. *United States*, 385 F. Supp. 346 (W.D. Pa. 1974), aff'd, 9 E.P.D. ¶ 10,225 (3d Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. Similar standards have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys' fees. E.g., the Water Pollution Control Act, 1972 U.S. Code Cong. & Adm. News, 3747; the Marine Protection Act, Id. at 4249-50; and the Clean Air

Act, Senate Report No. 91-1196, 91st Cong., 2d Sess., p. 483 (1970). See also *Hutchinson* v. *William Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943) (Fair Labor Standards Act).

In short, while the standards by which fees are awarded to plaintiffs have varied, Congress appears to have followed a uniform rule for defendants: awards of fees are available only in exceptional circumstances, if at all.[37] Against this background, it is not plausible to suppose that when Congress passed the monumental Civil Rights Act of 1964, it intended—silently—to discard the American rule and give defendants in employment discrimination cases an unprecedented weapon which would defeat the legislative will so laboriously debated and enacted.

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[37] In addition to these numerous statutes under which fees are available to defendants only in rare cases, Congress has also passed many statutes under which fees are not available to defendants under any circumstances. *See, e.g.*, Clayton Act, 15 U.S.C. § 15; Interstate Commerce Commission Act, 49 U.S.C. § 16(2); Fair Labor Standards Act, 29 U.S.C. § 216(b).

CONCLUSION

The judgment below should be affirmed.

October 1, 1977.

Respectfully submitted,

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